

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

74-2255

United States Court of Appeals

For the Second Circuit.

In the Matter of the Arbitration between INTSEL
CORPOLATION,

Petitioner-Appellee,

-against-

M.W. ZACK METAL COMPANY,

Respondent-Appellant.

*On Appeal From The United States District Court
For The Southern District Of New York*

Appellant's Appendix

ANTHONY B. CATALDO
Attorney for Respondent-Appellant
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New York, N.Y. 10006
(212) 962-0965

WEIL, GOTSHAL & MANGES
Attorneys for Petitioner-Appellee
767 Fifth Avenue
New York, N.Y. 10022
758-7800

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES DISTRICT COURT

FILED
July 16-74

Jury demand date:

JUDGE COLEMAN

U. S. Form No. 106 Rev.

TITLE OF CASE

ATTORNEYS

In the Matter of the Arbitration between
LITSEL CORPORATION,

Petitioner,

- against -

M. W. ZACK METAL COMPANY,

Respondent.

For plaintiff:

Weil, Gotshal & Manges
767 Fifth Avenue
New York, N.Y. 10022
PL-8-7800

For defendant:

Anthony B. Cataldo
111 Broadway, NYC 10006 -- 962-096

33-1155

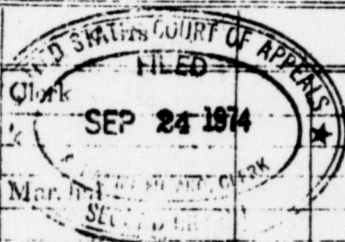
STATISTICAL RECORD

S. 5 mailed X

S. 6 mailed ✓

Basis of Action: Petition to
confirm Arbitration Award
\$5,956.13 plus interest

Action arose at:



Docket fee

Witness fees

Depositions

DATE

NAME OF
RECEIPT NO.

REC.

DISB.

6000. 10000

ii B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration :
between :

INTSEL CORPORATION, :

Petitioner, :

-and- :

M. W. ZACK METAL COMPANY, :

Respondent. :

73 Civ. 5344-M.I.G.

NOTICE OF APPLICATION
TO CONFIRM
ARBITRATION AWARD

PLEASE TAKE NOTICE, that upon the Petition to Confirm Arbitration Award, the arbitration agreements dated January 13, 1969 and August 7, 1969, and the award of the arbitrator in the above-entitled arbitration proceeding, duly acknowledged November 20, 1973, and made in accordance with the Arbitration Laws of the State of New York and the Commercial Arbitration Rules of the American Arbitration Association, the undersigned will move this Court, before the Honorable Murray I. Gurfein, at the United States Courthouse for the the Southern District of New York, Foley Square, New York, New York, on the 24th day of January, 1974 at four o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order

1. Confirming the aforementioned award
of the arbitrator;
2. Directing that judgment be entered
thereon;

NOTICE OF APPLICATION TO CONFIRM AWARD

3. For such other and further relief as the Court may deem just and proper, together with the costs of this proceeding.

Dated: New York, New York
December 17, 1973

WEIL, GOTSHAL & MANGES
ATTORNEYS FOR PETITIONER

PETITION TO CONFIRM

(same title)

The petition of Intsel Corporation, by its attorneys, Weil, Gotshal & Manges, against the respondent M. W. Zack Metal Company, respectfully shows:

1. Petitioner at all times hereinafter mentioned was and is a corporation organized and existing under the laws of the State of New York with its principal offices located in New York.

2. Upon information and belief, respondent at all times hereinafter mentioned was and is a corporation organized under the laws of the State of Michigan, with its principal place of business in Oakpark, Michigan.

3. This is a civil action wherein the amount in controversy, exclusive of interest and costs, exceeds the sum or value of \$10,000.

4. This Court has jurisdiction pursuant to 28 U.S.C. 1332.

5. On January 13, 1969 and August 7, 1969 petitioner entered into written agreements with respondent, M. W. Zack Metal Company, for the sale of certain aluminum tubing and rods in interstate commerce, copies of which agreements are attached hereto as Exhibits A and B, respectively.

6. Each said agreement provided in Paragraph 9 thereof:

"Any controversy arising under or in relation to this contract or any modification thereof shall be settled by arbitration in

PETITION TO CONFIRM

the City of New York in accordance with the Arbitration Laws of the State of New York and the Rules then obtaining of the American Arbitration Association, and judgment on the award may be entered in any court, State or Federal, having jurisdiction."

7. On April 12, 1973, petitioner served respondent with a Notice of Intention to Arbitrate and duly demanded arbitration.

8. Pursuant to such notice and demand, and in accordance with the aforementioned agreements and the Rules of the American Arbitration Association, Mark A. Buckstein was designated and duly sworn as arbitrator.

9. Respondent was represented by its attorney at all hearings conducted by the arbitrator.

10. Having been duly sworn, and having duly heard the proofs and allegations of the parties, the arbitrator made his award in writing, duly acknowledged the 20th day of November, 1973, a copy of which is annexed hereto as Exhibit C.

11. The arbitrator's award reads as follows :

1. M. W. ZACK METAL COMPANY, hereinafter referred to as RESPONDENT, shall pay to INTSEL CORPORATION, hereinafter referred to as CLAIMANT, the sum of THIRTY FIVE THOUSAND TWO HUNDRED FIFTY THREE DOLLARS and SIXTY CENTS (\$35,253.60) together with interest thereon at the rate of 6% from January 1, 1970 to the date of payment.

PETITION TO CONFIRM

2. All counterclaims of RESPONDENT are denied.
3. The administrative fees of the American Arbitration Association totaling SEVEN HUNDRED SEVENTY SEVEN DOLLARS and FIFTY THREE CENTS (\$777.53), shall be borne by RESPONDENT and postponement fees shall be borne by the Party requesting same. Therefore, RESPONDENT shall pay to CLAIMANT the sum of SEVEN HUNDRED TWO DOLLARS and FIFTY THREE CENTS (\$702.53) for said fees previously advanced by CLAIMANT to the Association, and CLAIMANT shall pay to the American Arbitration Association the sum of THIRTY DOLLARS (\$30.00) for postponement fees still due.
4. This AWARD is in full settlement of all claims and counterclaims submitted to this Arbitration."

12. No part of said award has been paid to petitioner by respondent although the same has been duly demanded.

WHEREFORE, petitioner respectfully moves the court for an order confirming said award and directing that judgment be entered thereon in favor of petitioner and against respondent as follows:

1. For the sum of Thirty-Five Thousand Two Hundred fifty-three Dollars and sixty cents (\$35,253.60), together with interest thereon at the rate of 6% from January 1, 1970; and
2. For the sum of Seven Hundred Two Dollars and fifty-three cents(\$702.53); and
3. For Interest on said amounts from the date of judgment; and

PETITION TO CONFIRM

4. For the costs of this proceeding.

Dated: New York, New York
December 14, 1973

WEIL, GOTSHAL & MANGES
ATTORNEYS FOR PETITIONER

INTERNATIONAL SELLING CORPORATION
220 EAST 42ND STREET • NEW YORK, N. Y. 10017

SOLD TO:

W. W. Metal Co.
100 Amsterdam Avenue
Detroit, Michigan 48202

PURCHASED FROM:

USalex as agents for
Cegedur

Confirmation of
Cables Order

TELEPHONE: OXFORD 7-1331
CABLE ADDRESS: INTSEL NEW YORK
INTERNATIONAL TELEX: NY 4348 INTSELL, N. Y.

DATE OF ORDER January 13, 1969

CUSTOMER ORDER 3104

OUR CONTRACT 50240-M.W. Zack

MILL ORDER Metal Co.

SALES AND PURCHASE CONTRACT

ITEM	DESCRIPTION OF MATERIAL	QUANTITY	PURCHASE PRICE	SALES PRICE
	2017-T451 Aluminum Hollow Bar (Tubing)	LBS.	PER LB.	PER LB.
1.	1-5/8" O.D. x .281 Wall x 14'3"-19' length	10,000	.4845	.503
2.	1-3/4" .312	10,000	.4045	.503
3.	1-3/4" .281 - shipped	10,000	.4345	.503
4.	2-1/8" .312	10,000	.4845	.503
<p>in accordance with ASTM B 211 Length Minimum 14'3" Maximum 19' No Stencilling Submit MTC & A and Special Customs Invoice Final destination for insurance: Detroit, Mich. Ship all in one single shipment To be applied against conversion End Use Unknown Customer will submit directly to Silvey Shipping necessary documentation permitting conversion entry</p>				
PACKING:		<p>AMERICAN ARBITRATION ASSOCIATION CASE No. 1310-0345-23 NOV 8 1973 No. 1-6 CLAIMANTS EXHIBIT</p>		
Export in cases of max. 2000 lbs.				
MARKS: 2-3900 Intsel 50240 2017-T451 Size Made in France Gross & Net lbs. Detroit No 1/up	SHIPMENT	CIF Detroit Duty Paid	SHIPMENT	Ex Dock Detroit Duty Paid
	TERMS	Net-30 Days	TERMS	Net cash against documents
	DELIVERY	Week 12 Ex Mill	DELIVERY	End of March 69
				MILL /

PETITIONER'S EXHIBIT A

TERMS OF SALES AGREEMENT

In addition to the terms and conditions set forth on the front side hereof, Buyer and Seller agree as follows:

1. Each shipment of material shall be shipped under a separate agreement; provided, however, that in the event of any default by Buyer, Seller shall have the right to postpone or cancel further shipments.

2. Seller agrees to use all reasonable efforts to obtain shipping facilities and to expedite shipment.

3. Seller shall not be liable for any delay in delivery of any shipment or any part of any shipment due to Acts of God, or belligerent powers, strikes, fires, floods, explosions, wars, differences with workmen, delays in transportation of the products sold hereunder or supplies necessary for the production or refinement of these products, or accidents to plant or machinery at mines or plants where produced, military or naval arrests or restrictions, curfew laws, or requirements of the United States or any state or territory thereof, or of any governmental subdivision thereof, or due to any other causes whatsoever, whether similar or dissimilar to those hereinabove enumerated, beyond Seller's control and not resulting from Seller's fault. This agreement shall be deemed suspended so long as its execution is prevented or delayed by such causes. Seller agrees to ship and Buyer agrees to accept deliveries in the regular course after such causes have been removed. If such period of suspension, however, exceeds 120 days, either party may, on written notice to the other, cancel such shipment.

4. Notwithstanding the provisions for payment herein provided, in the absence of shipping instructions, payment shall be due on the day following the expiration of the time provided for delivery. In such event, the Seller shall invoice the Buyer at the contract price. The material shall then be held for the Buyer's account and the Buyer shall pay appropriate storage charges thereafter.

5. No modification of this contract shall be binding unless in writing, signed by both parties, and no waiver by either party of any default shall be deemed a waiver of any subsequent default.

6. Claims of any kind or nature, except for latent defects, are specifically barred unless made in writing within ten (10) days after receipt of the material; and, in any event, prior to any processing or altering of the material in any manner from the original condition of delivery, whichever is earlier.

Claims for latent defects are barred unless made within sixty (60) days after receipt of the material.

In the event any claim shall be made pursuant to this section, Seller shall have the option, in full settlement of such claim, to deliver, within sixty (60) days after receipt of such claim, other material in replacement of the material upon which the claim is based, and Buyer shall thereupon return to Seller the material originally shipped.

7. The delivery of a shipment to any common carrier for delivery to the Buyer shall constitute a delivery to the Buyer.

8. This agreement shall be construed in accordance with the Laws of the State of New York.

9. Any controversy arising under or in relation to this contract or any modification thereof shall be settled by arbitration in the City of New York in accordance with the Arbitration Laws of the State of New York and the Rules then obtaining of the American Arbitration Association, and judgment on the award may be entered in any court, State or Federal, having jurisdiction.

AMERICAN ARBITRATION ASSOCIATION
CASE No. 1310-0395-73

NOV 8 1973

No. 1-B
CLAIMANTS EXHIBIT

PETITIONER'S EXHIBIT A cont.

INTERNATIONAL SELLING CORPORATION
EAST 42ND STREET • NEW YORK, N. Y. 10017

SOLD TO:
W. Zack Metal Co.
50 West 57th Street
New York, New York

PURCHASED FROM:
Ufalex as agents for
Cegedur

Confirmation of
Cabled Order

TELEPHONE: OXFORD 7-1331
CABLE ADDRESS: INTSEL NEW YORK
INTERNATIONAL TELEX: NY 4248 INTLSELL, N.Y.

DATE OF ORDER August 7, 1969
CUSTOMER ORDER 3917
OUR CONTRACT 50617 - Zack
MILL ORDER

SALES AND PURCHASE CONTRACT

DESCRIPTION OF MATERIAL		QUANTITY	PURCHASE PRICE	SALES PRICE
<u>2017-T4 Aluminum Round Rod, Extruded</u>		<u>Lbs.</u>	<u>Per Lb.</u>	<u>Per Lb.</u>
2-1/2" dia. round x 12 ft. length		10,000	.462	.464
In accordance with ASTM B211 but not cold finished No stencilling Submit MTC & A Final destination for insurance: Detroit To be applied against conversion Final user and end use unknown Customer will submit directly to Silvey Shipping necessary documentation for conversion entry Ship, if possible, together with order 50240/005-80563 S.39 Ex Mill				
ING: Export in cases of 2,000 lbs. max.		MEMBER OF THE PECHINEY GROUP		
		PURCHASE	10,000 / 102	SALES
S: ZM 3917 2017-T4 Size Net & Gross Lbs. Made in France Detroit No. 1/up	SHIPMENT	Cif Detroit Duty Paid	SHIPMENT	Ex Dock Detroit Duty Paid
	TERMS	Net 30 Days	TERMS	Net cash against documents
	DELIVERY	S.42 Ex Mill	DELIVERY	Mid Oct. Ex Mill

PETITIONER'S EXHIBIT B

TERMS OF SALES AGREEMENT

In addition to the terms and conditions set forth on the front side hereof, Buyer and Seller agree as follows:

1. Each shipment hereunder shall be deemed a separate sale and made under a separate agreement; provided, however, that in the event of any default by Buyer, Seller shall have the right to postpone or cancel further shipments.

2. Seller agrees to use all reasonable efforts to obtain shipping facilities and to expedite shipment.

3. Seller shall not be liable for any delay in delivery of any shipment or any part of any shipment due to Acts of God, or belligerent powers, strikes, fires, floods, explosions, wars, differences with workmen, delays in transportation of the products sold hereunder or supplies necessary for the production or treatment of these products, or accidents to plant or machinery at mines or plants where produced, military or naval arrests or restraints, acts, demands, or requirements of the United States or any state or territory thereof, or of any governmental subdivision thereof, or due to any other causes whatsoever, whether similar or dissimilar to those hereinabove enumerated, beyond Seller's control and not resulting from Seller's fault. This agreement shall be deemed suspended so long as its execution is prevented or delayed by such causes. Seller agrees to ship and Buyer agrees to accept deliveries in the regular course after such causes have been removed. If such period of suspension, however, exceeds 120 days, either party may, on written notice to the other, cancel such shipment.

4. Notwithstanding the provisions for payment herein provided, in the absence of shipping instructions, payment shall be due on the day following the expiration of the time provided for delivery. In such event, the Seller shall invoice the Buyer at the contract price. The material shall then be held for the Buyer's account and the Buyer shall pay appropriate storage charges thereafter.

5. No modification of this contract shall be binding unless in writing, signed by both parties, and no waiver by either party of any default shall be deemed a waiver of any subsequent default.

6. Claims of any kind or nature, except for latent defects, are specifically barred unless made in writing within ten (10) days after receipt of the material and, in any event, prior to any processing or altering of the material in any manner from the original condition of delivery, whichever is earlier.

Claims for latent defects are barred unless made within sixty (60) days after receipt of the material.

In the event any claim shall be made pursuant to this section, Seller shall have the option, in full settlement of such claim, to deliver, within sixty (60) days after receipt of such claim, other material in replacement of the material upon which the claim is based, and Buyer shall thereupon return to Seller the material originally shipped.

7. The delivery of a shipment to any common carrier for delivery to the Buyer shall constitute a delivery to the Buyer.

8. This agreement shall be construed in accordance with the Laws of the State of New York.

9. Any controversy arising under or in relation to this contract or any modification thereof shall be settled by arbitration in the City of New York in accordance with the Arbitration Laws of the State of New York and the Rules then obtaining of the American Arbitration Association, and judgment on the award may be entered in any court, State or Federal, having jurisdiction.

PETITIONER'S EXHIBIT B cont.

EXHIBIT C

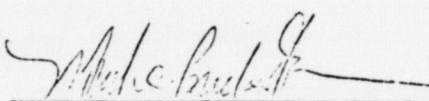
AMERICAN ARBITRATION ASSOCIATION

Case No. 1310-0000-73	X
In the Matter of the Arbitration between	X
INTEL CORPORATION	X
AND	X
M. W. ZACK METAL COMPANY	X AWARD OF ARBITRATOR
	X
	X
	X
CASE NUMBER: 1310-0000-73	X

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated January 13, 1969 and August 7, 1969, and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD, as follows:

1. M. W. ZACK METAL COMPANY, hereinafter referred to as RESPONDENT, shall pay to INTEL CORPORATION, hereinafter referred to as CLAIMANT, the sum of FORTY FIVE THOUSAND TWO HUNDRED FIFTY THREE DOLLARS and SIXTY CENTS (\$45,253.00) together with interest thereon at the rate of 6% from January 1, 1970 to the date of payment.
2. All counterclaims of RESPONDENT are denied.
3. The administrative fees of the American Arbitration Association totaling SEVEN HUNDRED SEVENTY SEVEN DOLLARS and FIFTY THREE CENTS (\$777.53), shall be borne by RESPONDENT and postponement fees shall be borne by the Party requesting same. Therefore, RESPONDENT shall pay to CLAIMANT the sum of SEVEN HUNDRED TWO DOLLARS and FIFTY THREE CENTS (\$702.53) for said fees previously advanced by CLAIMANT to the Association, and CLAIMANT shall pay to the American Arbitration Association the sum of THIRTY DOLLARS (\$30.00) for postponement fees still due.
4. This AWARD is in full settlement of all claims and counterclaims submitted to this Arbitration.

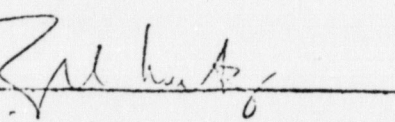
DATED: November 19, 1973


 MARK A. BUCKSTEIN

STATE OF NEW YORK
 COUNTY OF NEW YORK

} ss.:
 }

On this 20th day of November, 1973, before me personally came and appeared MARK A. BUCKSTEIN, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.


 Notary Public for the State of New York
 My Comm. Expires 12/31/75
 Commission Expires 12/31/75

PETITIONER'S EXHIBIT C

CROSS-MOTION TO VACATE AWARD

(same title)

The above named respondent will cross-move this court on the occasion of petitioners' motion before the Honorable Murray I. Gurfein at the United States Courthouse for the Southern District of New York, on the 24th day of January, 1974, at four o'clock in the afternoon of that day, or if said date is objected to as untimely then the 31st day of January, 1974, at the same time and place, or as soon thereafter as counsel can be heard, for an order

1. To deny petitioner's motion for a confirmation of the award.

2. To dismiss the petition upon the following grounds set forth in Rule 12(b) F.R.C.P.:-

- a. lack of subject-matter jurisdiction;
- b. lack of jurisdiction over the person;
- c. improper venue;
- d. insufficiency of process; and
- e. failure to state a claim upon which relief can be granted;

3. To vacate the award mentioned pursuant to 9 U.S.C. A., Arbitration, Section 10 upon the following grounds:

- a). the same was procured by corruption, fraud or undue means;
- b). the arbitrator was guilty of misconduct in refusing to hear evidence pertinent and material to the controversy, in relying upon incompetent and unlawful evidence, and was guilty of other misbehavior by which the rights of the respondent were prejudiced; and
- c). where the arbitrator exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made;

CROSS-MOTION TO VACATE AWARD

4. Directing that a re-hearing of this controversy upon the pleadings of the parties be had by this court and a jury at a proper venue thereof; and

5. That such other and further relief which this court may seem just and proper be had.

Dated, New York, New York
January 19, 1974

Yours, etc.
ANTHONY B. CATALDO
Attorney for petition
appearing specially herein
Office & P.O. Address
111 Broadway
New York, N.Y. 10006
Tel-962-0965

To: WEIL, COTSHAL & MANGES, Esq.,
Attorneys of Petitioner
767 Fifth Avenue
New York, N.Y. 10022

AFFIDAVIT OF EUGENE M. ZACK
IN SUPPORT OF CROSS-MOTION TO VACATE

(same title)

EUGENE M. ZACK being duly sworn deposes and says that he is President of M.W. Zack Metal Company, the respondent named above. That he had communications about the sales contracts for aluminum tubings which are the subject matter of this controversy with Mr. Victor Besso and a Mr. Romano, who are officials of Intsel Corporation, the petitioner. Mr. Victor Besso is the executive president of the corporation while Mr. Romano was in an assistant capacity. Deponent has been making deals with Mr. Besso for many years, for all types of merchandise, sold and bought between Intsel and Zack Metal Company, and usually, these deals have been in large quantities. These dealings with Mr. Besso have extended over the past twenty years. Both Mr. Besso and Mr. Romano were employed in their respective capacities at the time of the hearing on the arbitration in this matter on November 9, 1973 and insofar as deponent knows they are still so employed. Deponent attended the hearing on the arbitration which was held at 140 West 51st Street in Manhattan before Mr. Mark A. Buckstein, Esq., the arbitrator. Neither Mr. Besso nor Mr. Romano were present at the arbitration. Instead a Mr. Fifield was the only employee of the petitioner to testify at the arbitration and he had never taken part in the dealings in respect to the matters in controversy. When the notice to arbitrate was received by deponent, the notice was turned over to deponent's son Robert, who is a lawyer with an office in Southfield, Michigan with instructions to protect the interest of respondent. Since that time Robert decided that he would rather practice law in a warmer climate and

AFFIDAVIT OF EUGENE M. ZACK
IN SUPPORT OF CROSS-MOTION TO VACATE

specialize in a particular field of law and he chose admiralty. He withdrew from the practice of law in the Detroit area, moved to Florida, enrolled in the Law School of Miami University, and entered courses of maritime affairs, at where he is now engaged. What Robert did or did not do in this matter, deponent does not know. When deponent learned that a hearing was scheduled in July, 1973, he referred the matter to Mr. Cataldo in New York City. All papers were forwarded to Mr. Cataldo. Shortly afterwards, Mr. Cataldo informed me that he would have to prepare an answer to the charges and suggested a counterclaim for Intsel's failure to deliver the goods on time as agreed. He was authorized to file the pleadings he suggested. Also Mr. Cataldo informed me that Mr. Buckstein was the appointed arbitrator although he had been pecked by Intsel and the American Arbitration Association had refused to give Mr. Cataldo a choice of arbitrators and had refused to change arbitrators. Deponent asked what could be done about the matter. Mr. Cataldo replied that he had objected to the appointment, and he would again object at the hearing to preserve deponent's rights. At the opening of the hearing, in deponent's presence, Mr. Cataldo stated that he wanted to record his objections to proceeding before the sitting arbitrator, because Zack was not given an opportunity to name an arbitrator. The arbitrator said that no record of the objections could be made because it was not customary to make a record in

AFFIDAVIT OF EUGENE M. ZACK
IN SUPPORT OF CROSS-MOTION TO VACATE

the hearing and there was no stenographer present. Besides, he said that he was the arbitrator chosen and that closed the issue.

The facts of this matter started in the fall of 1968. Deponent had received an inquiry for aluminum casings from a customer in the Detroit area, Fox Manufacturing Company. Respondent is a Michigan corporation and at that time it had offices in Warren, a suburb of Detroit, Michigan. Deponent has a representative in New York, one Edward E. Krasnov, of 250 West 57th Street, who buys and sells commodities, mostly metals, for respondent, on a commission basis. On this occasion, deponent asked Mr Krasnov to secure prices for the tubing as described by Fox Manufacturing Co. Prices were obtained and a contract to buy 40,000 lbs. of the tubing was made in December 1968 with Intsel, the petitioner. Intsel is a commission broker and is part of a group of companies located in France call 1 Pecheney. One of Intsel's objectives is to sell metal objects that can be fabricated to specifications at a mill in France. Apparently, in this case a French mill called Cegedure had agreed to fabricate the tubing at Intsel's request. However, respondent's contract was with petitioner.

Despite the agreement already made, the French mill was not sure of the end product to be made and it requested a sample. In february, 1969, a sample was supplied to Intsel and it was obtained from Fox Manufacturing Co. It was the usual

AFFIDAVIT OF EUGENE M. ZACK
IN SUPPORT OF CROSS-MOTION TO VACATE

hollow tub with the legend United States Government with a serial number at the bottom of the casing. The agreement for the 40,000 lbs. of this material was altered to the extent that only 10,000 lbs. was sold and purchased. In essence, it was a trial order. If the final product complied with the sample, additional orders would be placed. A written memorandum of the reduction of the quantity to 10,000 lbs. was made and attached hereto as a true copy of the sales confirmation issued by Intsel confirming that the order was reduced to 10,000 lbs. It is marked Exhibit 1.

The earlier contract of December 1968 as amended was fully performed. This testimony was uncontradicted at the hearing on the arbitration. However, Intsel put into the record their own purchase order from Cegedure which is now Exhibit A to Intsel's petition in this Court. In its brief to the arbitrator, Intsel argued that the June order was a modification of the original 40,000 lbs. order made in December 1968. The fact is that Intsel sent its sales confirmation to respondent covering the purchase order of June 18, 1969 and in that sales confirmation it cancelled the items that had been stipulated in the December order. See a true copy of the said confirmation marked Exhibit 3 hereto attached.

The new agreement was for different sizes and different descriptions. As the 10,000 lbs. was paid for, the December order was fully executed.

AFFIDAVIT OF EUGENE M. ZACK
IN SUPPORT OF CROSS-MOTION TO VACATE

There were no arbitrable issues under the January 1969 writing. The award stated that there was some \$36,000. due from Zack to Intsel under the January 13, 1969 writing and the August contract. The arbitration completely ignored the June contract, and awarded on a contract under which it was conceded that nothing was due.

The arbitrator referred to the contract upon which he made the award as the January 13, 1969 contract. Intsel says that that contract is Exhibit A attached to the petition. Clearly, there was and never has been any dispute under that contract as it ended with full performance of a part and an agreement to cancel the remainder. The performance was testified to without contradiction and even remains conceded. The cancelled parts are designated by Intsel in its confirmation marked Exhibit 3.

It is most important to observe that the confirmation of the sales Exhibit 3 restates the terms of the purchase order of June 18, 1969, in every respect, including the all-important shipping instructions and delivery date. In addition to noting the cancellation of the tubing originally ordered, the confirmation affirms that the delivery date on the first mentioned 15,000 lbs. was "as soon as possible" and that the remaining 40,000 lbs. was to be delivered at Detroit in September. Intsel conceded at the hearing that time was of the essence in each of

AFFIDAVIT OF EUGENE M. ZACK
IN SUPPORT OF CROSS-MOTION TO VACATE

these contracts.

In July, deponent received another order for 10,000 lbs. of aluminum rods from Fox. Respondent issued its purchase order dated July 29, 1969 for this new quantity. A true copy of this purchase order is attached and is marked Exhibit 4. But the shipping date designated was incorrect. A modification was arranged by deponent with Mr. Besso in conversations subsequent to July 29, 1969. The delivery date was changed from the time shown on Exhibits 4 to a delivery at Detroit in September to coincide with the delivery of the tubing ordered in June. Intsel's confirmation of sale confirms the new delivery date. A true copy is attached hereto as Exhibit 5.

Fox Manufacturing Co. was itself in a contract with the government to supply the finished product at agreed times. Because of its own contractual deadline, Fox needed these casings at Detroit no later than September. For these reasons, deponent had negotiated with Intsel for a change in the delivery date for this last 10,000 lbs. to September. The correction was agreed to by Intsel and in its sales confirmation it reflected this fact by noting that the shipment was to go forward with the previous order. A slight increase in price from .462 to .464 was also agreed upon and the confirmation of sales confirmed it.

In the month of September, deponent received an inquiry from Fox Manufacturing Co. about the expected arrival of

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the aluminum tubing. Your deponent telephoned Mr. Krasnov asking him to make the inquiry of Intsel. Mr. Krasnov did make the inquiries and he kept the deponent informed of his conversations with Intsel. Finally, Mr. Krasnov reported that he could not get any confirmation from Intsel that the shipment had been made or that it could be expected at Detroit in the month of September. Deponent reported the refusal of Intsel to confirm a delivery date for September to Fox Manufacturing Co. who thereupon cancelled the order. Deponent then told Mr. Krasnov to cancel the order to Intsel because Fox had cancelled its order with respondent. Krasnov cancelled respondent's orders to Intsel, both the one purchased June 18, 1969 and the one purchased July 23, 1969. Mr. Krasnov stated at the hearing that when it appeared evident that the shipments would not arrive at Detroit, in September, he told Mr. Mernick of Intsel, the person at Intsel with whom he had negotiated the purchases, that Fox had cancelled its contract with respondent and that he was cancelling the contract of respondent with Intsel. Mr. Mernick said alright what can I do. I can't get a shipping date out of the mill. I'll tell the mill Zack has cancelled the contract.

Insofar as your deponent knows, matters stood still with the cancellation by Mr. Krasnov. However, in November, deponent received shipping documents from Intsel showing that three ships were scheduled to arrive at Detroit during the month carrying the casings and rods ordered.

The matter was referred to Mr. Krasnov. Mr. Krasnov

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told Mr. Mernick that the material would not be accepted, that the contract was cancelled. He testified to this without contradiction.

Also, Mr. Krasnov testified before the arbitrator that he had cancelled the contract with Intsel for the latter's failure to deliver on the agreed date; that he could not extend the delivery because the customer, Fox, had cancelled its contract with Zack and had covered its materials requirement elsewhere. Also Mr. Krasnov stated that Mernick kept telling him that he had not heard from the mill and therefore he could not confirm delivery for September. At this point, the arbitrator questioned Krasnov about Clause 3 on the back of the sales confirmation, asking whether that clause hadn't excused Intsel's failure to deliver. Mr. Krasnov said "no" he had never read the clause, but it did not apply anyway. No evidence had been given by anyone to show that the stated excuses in Clause 3 had been claimed by Intsel to be applicable. Yet, the arbitrator adopted a stern voice to inquire of Krasnov whether the September delivery dates had not been postponed. With this Krasnov became angered at the arbitrator for trying to excuse the petitioner's, Intsel's, failure to deliver. He left the room, refusing to heed even deponent's lawyer to calm down and finish the testimony.

This was not the first time that the arbitrator had shown a predisposition to enter the dispute to question matters from petitioner's viewpoint. He allowed Mr. Fifield, who by

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his own admission was not familiar with the negotiations for the purchase and sale of the material and with the cancellation of the agreements in September 1969, to state that Intsel's agreement with the mill was the contract of the two parties, and that the mill was delayed in some indefinable way on making the delivery. Mr. Fifield admitted on cross-examination that these communications of Intsel with its mill were not sent to Zack, they were not discussed with Zack and Zack was never asked to consider their impact upon the contract obligations of the parties. Mr Krasnov had appeared agitated by these claims of Mr. Fifield, exploding to say that the telex between Intsel and the mill had nothing to do with the matter, that Intsel never discussed the import of those messages with him, that in fact, one of the Merrick telexes in late September had said that Intsel's customer, Zack, was angry instead of reporting that Zack had cancelled the contract. See Exhibit 5.

All objections by respondent's attorney to the irrelevancy and incompetency of said communications and the writing of January 13, 1969 were overruled on the obviously erroneous theory that the arbitrator would have to let the evidence in to see if it had any relevancy. Its irrelevancy was obvious.

At the same time, the arbitrator had refused to admit Intsel's confirmation of the sale to Zack. This ruling was accompanied by sly remarks respecting the alleged irrelevancy

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of Intsel's confirmation of sale to Zack since Intsel was showing its knowledge of shipping conditions in offering the telexes.

Earlier, Zack's attorney had called the arbitrator's attention to the clause of the contract providing arbitration and to the fact that it specifies that the laws of the State of New York were to be applied. The attorney stated that he had prepared a trial memorandum limiting the issue to the facts of the contracts of June and July 1969 and that no issues remained respecting the December-January contract and the December 1969 oral agreement to take in the goods in deponent's warehouse for Intsel's account. The arbitrator stated that, of course, he would comply with the law of New York but that he believed that he had the power to deal with the facts as he saw fit. The attorney countered by saying that even what is a fact is a matter of law to which the arbitrator failed to reply.

Now it seems from a reading of the award that the arbitrator disregarded the law which he said he was going to follow and went ahead and decided issues which he should not have decided. The only contracts were the purchase orders of June 18, 1969 and of July 23, 1969 and their respective sales confirmation, but the arbitrator did not base his award on them at all. In fact, he ignored the record and conceded evidence.

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He ignored the uncontradicted evidence of cancellation. Also, he ignored the uncontradicted evidence of the oral agreement deponent made with Mr. Besso to take in the material for storage and resale for Intsel's account. Failing to call Mr. Besso and Mr. Romano was tantamount to an admission that this oral agreement was made as testified to by deponent. Also the arbitrator ignored the fact that Intsel's own writings prove that the tendered delivery was made in late November instead of September. There was no proof of a modification of the delivery date provisions and Intsel conceded that delivery as agreed was material to the contracts. The disregard of these matters by the arbitrator was itself a manifest disregard of his duties as an impartial neutral arbitrator and misconduct that should entitle Zack to an order of this Honorable Court vacating the award.

WHEREFORE, it is submitted that the award is unlawful in that the arbitrator treated the facts as though he could disregard the truth and find whatever facts he believed necessary to support his decision. Further, deponent sincerely believes that the only issue within the arbitrator's duties was the possible legal effect of the cancellation in September because of Intsel's failure to deliver that month. Yet, this issue was not decided by the arbitrator. It would appear to be useless to refer this matter back to arbitration because of the uncontra-

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dicted fact of cancellation, but instead this court should enter judgment for the respondent. If, however, an issue of fact appears to this court for trial, it is respectfully submitted that such an issue be referred to a trial by this court, by a judge and jury.

Sworn to before me this
20th day of February, 1974.

EUGENE M. ZACK

Notary Public

AFFIDAVIT OF EDWARD E. KRASNOV

(same title)

EDWARD E. KRASNOV being duly sworn deposes and says that he is commodities broker with an office at 250 West 57th Street, in the Borough of Manhattan, City of New York.

In the fall of 1968 Mr. Eugene M. Zack, president of M.W. Zack Metal Company of Detroit asked deponent to get prices for a quantity of hollow aluminum tubing of certain United States Government specifications for a customer of his. Deponent, among others, communicated with a Mr. Mernick of Intsel Corpora-

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tion. Intsel is known in the trade as a representative of metal fabrication mills located in France. After several conversations, Mr. Mernick submitted a price which was transmitted by deponent to Mr. Zack. A few days later Mr. Zack told deponent that he would agree to buy 40,000 lbs. of the tubing at the price mentioned. Your deponent telephoned Mr. Mernick and an agreement was made in mid December 1968 to buy and sell 40,000 lbs. at the government specifications mentioned and at the agreed price. A purchase order was sent by Zack and Intsel responded with a confirmation of sale. In mid January 1969, Mr. Mernick telephoned deponent to ask if Zack's customer could furnish a sample of the tubing wanted. A sample was made available. Deponent personally delivered it to Mr. Mernick. On the bottom of the tubing was the legend United States of America with a serial number. During these conversations with Mr. Mernick the fact that Zack was not the manufacturer and that the manufacturer had his own contract with the government was talked about. Zack was required by Intsel to get his customer to furnish an affidavit as to the end use of the product so that Intsel's liability for the duty would be reduced.

As a result of furnishing the sample, it was agreed with Intsel that the order for 40,000 lbs. should be reduced to 10,000 lbs. This reduced order was to be a trial order. The 10,000 lbs. of tubing were made, shipped, received, approved and paid for by May 1969. In June 1969, Zack got an order for 55,000

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lbs. of the tubing from Fox and told deponent to order the sizes and dimensions of the sample which were different from the sizes and dimensions specified in the prior order. Deponent negotiated with Mr. Mernick and made an agreement to buy the 55,000 lbs. of new material. The principal stipulation of the sale was the delivery date. The whole shipment had to be delivered at Detroit in September 1969 with an advance shipment of 15, 000 lbs. to be "shipped as soon as possible" to stock Fox with that quantity in advance of the delivery of the remainder of the order.

In July, Zack told deponent that 10,000 lbs. of rods was wanted by Fox. Deponent telephoned Mernick and after negotiations it was agreed that he would sell Zack an additional 10,000 lbs. but Mr. Mernick suggested an October shipping date. This seemed acceptable to deponent but Fox refused to accept delivery of even this 10,000 lbs. for October. Mr. Zack spoke with Mr. Besso and told him that he could not get the order unless he agreed to a September delivery the same as the June order. Mr. Besso agreed to ship and deliver the 10,000 lbs. along with the previous order of 55,000 lbs.

In early September, Mr. Zack asked deponent to check with Intsel to see if the shipping would be in time for delivery at Detroit later that month. Deponent telephoned Mr. Mernick and asked him about the delivery of the material. Mr. Mernick said he would telex the mill and let deponent know. Mr. Mernick

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did not call back. Deponent telephoned him again. Again Mr. Mernick said he did not know if shipment had been made but he would telex again. A few days later deponent telephoned Mr. Mernick. This time Mr. Mernick said that he could not get a shipping date out of the mill. Deponent said that he would report that fact to Zack. Deponent told Mr. Zack that Mr. Mernick had told him that the mill would not even let Mr. Mernick have the shipping date. This was mid-September and it looked like that Intsel would not meet the delivery requirements of the contracts. Mr. Zack called deponent to tell him that Fox had to have the material delivered at Detroit in September or he would cover himself from other sources. Deponent telephoned Mr. Mernick and told him that Fox had to have a September delivery to meet his own contract deadline. Mr. Mernick said that he would again telex his mill and report this fact. On or about September 25, 1969 deponent telephoned Mr. Mernick and demanded that Intsel assure him that the agreed delivery would be made. Mr. Mernick refused to make that assurance but promised he would telex the mill again. Deponent reported this refusal to Mr. Zack. The next day, September 26, 1969, Mr. Zack told deponent that Fox had cancelled his contract with Zack and deponent should tell Intsel that Zack will have to cancel, too. Deponent telephoned Mr. Mernick and told him that Fox had cancelled his contract with Zack and consequently deponent was cancelling the contract for Zack. Mr. Mernick said he would telex the mill that the order was cancelled.

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In mid-October Mr. Mernick telephoned to tell him that a part of the order could be shipped that month. Deponent told him that Fox had covered the order from another source and Zack could not take the late delivery. In fact, as it happened, even this October shipping did not arrive until late November.

Deponent attended the hearing on the arbitration as a witness for Mr. Zack. He arrived early and listened to all that was said and talked about. Deponent heard Zacks attorney tell the arbitrator that he objected to the arbitrator proceeding with the hearing because he was one picked by Intsel, that the society had refused to give the attorney a choice of arbitrators, which he had requested and that he should let the arbitrator know of that objection. The arbitrator declined to act as requested and he proceeded with the hearing.

Mr. Fifield testified. Deponent knew Mr. Fifield and knew that Mr. Fifield had not taken any part in the negotiations that led to the contracts. Mr. Fifield proceeded to testify that he was Mr. Mernick's boss and he then identified the writing marked Exhibit A as the contract of the parties. This was perjurous as Mr. Fifield knew that that Exhibit was Intsel's own confirmation of purchase of the mill of the first 40,000 lbs. which order was later reduced to 10,000 lbs. and fully performed. Next Mr. Fifield identified Zack's written confirmation dated June 18, 1969 for the new purchase order ~~for~~ 55,000 lbs. Zack's attorney offered Intsel's confirmation of sale for the 55,000 lbs. dated July 23,

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1969, which confirmed the delivery as stated above. Next, Mr. Fifield identified Zack's written confirmation dated July 22, 1969 for the 10,000 lbs. of rods and Intsel's confirmation of August 7, 1969.

Then Mr. Fifield identified certain telex messages between Intsel and the mill respecting the sizes and measurements of the tubing to be made under the first order of December 1968. Then he identified other telexes that passed between Intsel and the mill in September 1969. Whether these were the only telexes that passed between them is not known, but one in late September which was supposed to have informed the mill of the cancellation of the contract by Zack simply stated that Zack was angry. It appeared to deponent that Intsel was flim flaming the arbitrator by the use of these telexes. They had absolutely nothing to do with Zack's contracts with Intsel. The attorney for Zack objected to their introduction but they were admitted. In admitting them the arbitrator with a sly smile on his face said that he would let them in to see if they had a bearing in the matter.

Zack's attorney had objected to the January 13, 1969 writing being introduced as having no relevancy, but Mr. Fifield said that it was the same as the confirmation of sale that was sent to Zack; but that was not true. The confirmation to Zack was introduced and it showed that it was differ-

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ent from Exhibit A. Yet, the arbitrator refused to strike it with the same amused smile. Deponent concluded that the arbitrator was not being neutral but was showing partiality to Intsel.

Zack's attorney argued the point that as New York law controlled and as New York law would not allow the January 13, 1969 writing into evidence, the arbitrator should follow that law. The attorney in his opening statement at the hearing had stressed that the only issue for arbitration was whether the June contract for 55,000 lbs. and the July contract for the additional 10,000 lbs. had been cancelled for cause by Zack. Also the attorney said that concededly the delivery offered was made in late November and that was not accepted but it was proof of Intsel's breach of the contracts, and that the breach put an end to the arbitration. The arbitrator acknowledged that he should and would apply New York law. He did not make any remark about the issue to be arbitrated as stated by Zack's attorney. He did remark that he was the sole judge of the evidence.

At that time Mr. Fifield said he did not know that Zack had a customer for the tubing, deponent could not bear the obvious misinformation and volunteered to say that he did, too, know that the tubing was to be resold to Fox, a government contractor. Also, Zack's attorney brought out

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on cross-examination of Mr. Fifield that Zack was never sent a duplicate of the January 13, 1969 paper, Exhibit A; nor were any of the telexes passing between Intsel and the mill were sent to Zack, and that their contents were never discussed with Zack. However, Mr. Fifield persisted in the ambiguous statement that they had to do with the contracts a statement that the arbitrator refused to strike.

While deponent was answering questions about his talks with Mr. Mernick in September and had gotten to the point of cancelling the contract because it was evident that Mr. Mernick could not meet the delivery date and while deponent was reading Mr. Mernick's telex to the mill which said that the customer was angry instead of reporting the cancellation as Mr. Mernick had said he would do, the arbitrator interrupted the questioning of deponent by Zack's counsel. He demanded to know whether deponent had ever read Clause 3 on the back of the sales confirmation of June 23, 1969. Deponent said he did not know anything about clause 3, that that writing had gone direct to Zack at Detroit and he had not read it. Deponent was asked to read Clause 3. He did and he then said that none of the things written about Clause 3 had happened. In fact, Intsel had not claimed that any such excuses applied. Your deponent said that it had specifically been agreed that time was of the essence in order for Zack to buy for the resale to a government contractor. Mr.

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Fifield on the stand had testified that time was of the essence in these cases. The arbitrator continued his questions in voice and manner of questioning which was so hostile that it clearly appeared that he was trying to bring the facts to a situation that a late delivery was excused when those events had not occurred and Intsel itself, was not even claiming that they applied. Deponent got angry at the thought that a so-called neutral arbiter was acting as an advocate for a party, that he believed that he was facing a kangaroo court and could be of no help to a fair and impartial judgment and as he was about through with his testimony, he said he was not going to say anything more and left the room.

Sworn to before me this

22th day of February, 1974. EDWARD E. KRASNOV

AFFIDAVIT OF ANTHONY B. CATALDO
IN SUPPORT OF CROSS-MOTION TO VACATE

(same title)

ANTHONY B. CATALDO, being duly sworn, deposes and says that he is the attorney for the named respondent in this proceeding to confirm an award made by a single arbitrator; deponent represented the respondent on the arbitration

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proceeding and he is familiar with the facts of the case and with the proceedings that occurred both at the arbitration association and at the hearings; he is competent to make this affidavit in support of respondent's cross-motion to vacate the award and in opposition to petitioner's motion to confirm it.

The function of this affidavit is principally to clarify the points of respondent's cross-motion. It will also state the facts of the proceedings at the arbitration board coming to deponent's personal knowledge and which may be pertinent to the discussion of the separate reliefs being requested by respondent on its cross-motion and in opposition to petitioner's motion.

First, petitioner's motion should be denied.

a) because the form of this proceeding is not a lawful method of commencing an action under the Federal Rules of Civil Procedure. Rule 7 provides that the only pleadings in the District Court shall be a complaint, an answer, a counterclaim and in some cases, a reply. A petition in a special proceeding as has been adopted here is not within the rules. Rule 8 provides the general rules of pleading and Rule 10 for the forms of pleading. Both these rules are contravened by the pleadings adopted by the petitioner. Rule 2 states that a civil action is commenced by filing a complaint. In no event is a form of a special proceedings as recognized in State Court a practice sanctioned

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by the Federal Rules of Civil Procedure. As matter of form, this pleading now before the Court is bad.

Secondly, petitioner has attached two exhibits along with the award, which exhibits are said to be the contracts which were the subject matter of the controversy. Actually, neither exhibit is a contract. Respondent's signature does not appear on either document. As they purport to be sales contracts of more than the statutory limit, they are invalid by force of the Statute of Frauds. The arbitration agreement (Exhibit A, 2nd page) states that disputes shall be settled according to New York Law. As New York law prescribes that such contracts must be subscribed by the parties to be charged therewith, those writings cannot support the award.

Also, note that Exhibit A is for 40,000 lbs. of material purchased at .4845 per lb. of material said to be purchased at .462 per lb. or a total of \$4620. The two orders call for a total price of \$24,000. Looking at the award, it will be seen that it allows a recovery of \$35,253.60. plus interest. The award is excessive if nothing else. The award, rather, is plainly a gross miscarriage of justice of which the foregoing errors are but two examples. It should be stricken for either reason.

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Third: Should the petitioner claim the right to submit evidence on its motion or on respondent's cross-claim, then respondent will have the right to submit evidence too. In that circumstance of fact issues appear either on the petitioner's motion to confirm or respondent's motion to vacate, a trial should be ordered of such issues.

Fourth: Respondent's motion to dismiss the petition under Rule 12(b) on the grounds enumerated as 2(a), (b), (c) and (d) of its motion papers, are based upon the patent and conceded facts that respondent is not a resident of the State of New York but is a Michigan corporation with offices at Detroit, Michigan and the summons in these proceedings with the petition and notice were served personally by the United States Marshal at Detroit. Rule 4 (f) F.R.C.P. limits the efficacy of process of the district courts to cases where such process may be served within the territorial limits of the State within which the district court is held. The process of this court may not effectively be served outside of the State of New York. Consequently, the service of the summons in this case at Detroit, Michigan, is a nullity and this Court does not have jurisdiction of the case. Nor does Section 9 of the Arbitration Act save this suit because the agreement under which the award was allegedly made provides that only those Federal Courts having jurisdiction, without

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resort to the agreement, may confirm an award. As the limits of this court's process is New York State, this court could not have jurisdiction, but the district court of Michigan at Detroit might. Hence, this action was improperly commenced in this court. Also, Section 4 of the same Arbitration Act specifically provides that the jurisdiction of the district court may not be invoked to enforce an arbitration agreement unless the court would have jurisdiction in the ordinary sense under Title 28. This means, of course, that in diversity cases the process of the district court cannot be served outside the territorial limits of the State in which the court is located. The provision in Section 9 of the Arbitration Act that in case an arbitration agreement does not state which court may confirm the award the power to do so is given to that district court having a situs in the State where the award has been made, is inapplicable as the agreement in question does specify a court which may confirm; albeit a Federal District Court having jurisdiction. As we have seen above, such a district court might be Michigan district court but not this court.

Fifth: Respondent's motion to dismiss for failure to state a claim upon which relief can be granted is based upon the facts stated in the petition itself is recounted in

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paragraph 2 of this affidavit and it as based upon affidavits that go into the merits of the controversy to show that neither Exhibit A nor Exhibit B is the true contract of the parties and that there were irregularities in the proceedings upon the arbitration of such a nature, as to warrant the vacature of the award by virtue of Section 10 of the Arbitration Act for the reasons stated in part 3(a), (b) and (c) of respondent's motion.

Sixth: The reason stated under 3 (a) viz; the fraud, corruption or undue means complained of is the fact that the respondent was refused the privilege of naming an arbitrator of its own and the arbitrator who heard the controversy was one picked by the petitioner and not an impartial umpire nor one lawfully picked by the arbitration association or by any two chosen by the parties as is customary. It appears that the arbitration was invoked by petitioner and that notice of it was sent by mail to respondent at Detroit, who asked Detroit counsel to handle the matter. That counsel was a son of the president of the respondent company, who was, at the time, in a state of transition as to his own future. Sometime after the notice was received and before the first hearing date was set, that counsel abandoned his offices in Detroit and moved to Miami, Florida,

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where he enrolled in post-graduate work in the Law School of Miami University. In his place deponent was retained. The first thing deponent did was to apply for an adjournment of the pending hearing. It was denied at first, but upon making a personal appearance and re-stating his reasons for the adjournment, the adjournment was granted. Upon re-viewing the files of the respondent, deponent noticed the absence of the claim. He requested a copy of the claim from the association. He then sought to file an answer and a counter-claim and to name an arbitrator. He was permitted to file the pleadings but he was not permitted to name an arbitrator. Attached hereto and marked Exhibit 1 is a true copy of the pleading. He was advised by Mr. O'Hara, Secretary of the Arbitration Association, that the arbitrator, Mark A. Buckstein, had already been picked and deponent could not change that. He was at the same time advised by said Secretary that Mr. Buckstein was a choice of the petitioner. The said secretary said that respondent had not answered the letter requesting it to name its choices. Deponent explained the above facts about the son moving to Florida and urged that as a recognition of a situation that was not really the fault of the respondent, the respondent should be permitted to exercise a choice of arbitrators. This request was refused.

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Deponent thereupon and again upon the commencement of the hearing, objected to such refusal to name a neutral arbitrator and moved the arbitrator to disqualify himself. This motion was quickly denied. This motion was more for the purpose of preserving the right of the respondent to object to the hearing before the arbitrator was chosen. The refusal to provide respondent with a choice of arbitrators and insisting upon a hearing before an arbitrator picked by petitioner worked to the detriment of the respondent. The arbitrary conclusion that followed and which has made this litigation necessary is proof of the necessity to have proceeded before a neutral arbitrator. Because it did not so proceed and because of the treatment of the evidence which could also be considered under this heading, the arbitrator became so grossly unlawful. The merits are however discussed infra.

Seventh: Under 3(b) respondent complains of the arbitrator's misconduct in refusing relevant and material evidence, and in letting in hearsay and incompetent writings to vary the terms of the written agreements of the parties. Also, the arbitrator injected himself into the controversy by badgering respondent's witness, suggesting by his tone and questioning that the witness was not telling the truth,

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meanwhile, the arbiter's real motive was to put words into the mouth of the witness from which he might draw an inference favorable to petitioner. This badgering was so intense, that the witness affected Krasnov, feeling his presence and testimony would be futile and that a fair and just decision would not be had, got up and left abruptly, without affording deponent the chance to finish that witness' testimony. In support of this last statement, the affidavit of the witness Krasnov will be submitted to this court.

Also, by allowing incompetent writings into the record, the arbitrator relied upon incompetent documents to find that certain writings were the contracts of the parties when they were not, and he failed to find the true contracts. Note that Exhibits A and B are not signed by respondent. Also there was put into evidence, the real contracts of the parties, but such documents were disregarded. This action cannot be a rightful exercise of the powers of an arbitrator to find what writings were the controlling contracts. Acting arbitrarily, as he did, is not applying the laws of the State of New York, as he said he would do and as the parties had agreed he should. The failure to accept the June 18, 1969 and July 29, 1969 orders as the real contracts of the parties is also discussed under part 3(c) of respondent's motion to vacate the award. That failure can be considered as misconduct or as an excessive use of power.

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Eighth: The latest stated ground for vacating the award, viz., 3(c) is that the arbitrator exceeded his powers or so imperfectly executed them that a mutual, final and definite award upon the controversy submitted was not made. This rests upon the arbitrary action of the arbitrator in refusing to recognize the writings spelling out the real contracts of the parties. When an umpire or an arbitrator who is supposed to be impartial disregards the writings that express the true contracts of the parties and instead relies on writings that are incomplete or are not part of the subsisting agreements of the parties, the all-important impartiality has gone out the window. Instead, lawless award is made at least one which is contrary to the law of New York. Instead of justice, an abuse of discretion is meted out. This arbitrator said that he acted under a contract dated January 13, 1969 and one dated August 7, 1969 and offered to this court are Intsel's confirmations of purchase from Ufalex as agent for Cegedure. The confirmations to Cegedure are entirely irrelevant and incompetent documents.

Starting from the beginning, there were three purchases. The first was dated in December 1968 for 40,000 lbs. confirmed by Intsel on January 7, 1969. The second one was dated June 18, 1969 for 55,000 lbs. which was confirmed by Intsel on June 23, 1969. The third order was for 10,000

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IN SUPPORT OF CROSS-MOTION TO VACATE

lbs. of rods dated July 23, 1969 and confirmed by Intsel. The first order was amended to a sale of a trial order of 10,000 lbs. Intsel's mill was never sure of just what was wanted until a sample of the casings was obtained by Zack from its customer and sent to Intsel. Intsel in turn passed the sample on to its mill. Intsel and respondent then agreed to reduce the 40,000 lbs. order to 10,000 lbs. to see if the mill could satisfactorily copy the sample. It was proven that it could when the 10,000 lbs. order was manufactured, delivered, approved by Fox, and paid for by Zack. All this occurred by May 1, 1969. This then concluded the first order by performance of a part and by cancellation of the rest. In June 1969, Zack received an order from Fox for 55,000 lbs. and by letter dated June 18, 1969, Zack confirmed the purchase. The price was still the same, viz.: \$.4845. One shipment of 15,000 lbs. was requested to be made "as soon as possible". The balance of 40,000 lbs. was requested for arrival at Detroit in September. Intsel's confirmation of this order was in writing and is dated June 23, 1969. It confirms the sale of the entire 55,000 lbs. just as ordered including price and delivery. The third purchase was for 10,000 lbs. of aluminum rods. The purchase price was said to be \$.4620 with shipment stated as end of October early

AFFIDAVIT OF ANTHONY B. CATALDO
IN SUPPORT OF CROSS-MOTION TO VACATE

November at Detroit. Some time before the written confirmation of sale was issued by Intsel for this order, Mr. Zack and Mr. Besso agreed to change the delivery date to coincide with the delivery of the 55,000 lbs. ordered in June, viz; September arrival at Detroit. Intsel demanded a higher price of .4640 and Zack agreed to it. Intsel confirmed the sale with changed delivery date in its writing of August 7, 1969. The arbitrator disregarded the respondent's purchase orders of June 18, and July 23, 1969. Instead it made an award based upon the incompetent documents, Exhibits A and B, attached to the petition. These documents are not signed by Zack and are not its contracts with Intsel. Both Exhibit A and Exhibit B are Intsel's confirmation of a purchase from its own mill. Neither express an obligation on the part of Zack to buy the goods described. They do not state the contract of the parties. The arbitrator just did not treat with the contracts made by respondent, Zack, and which evidenced his consent to arbitrate. Axiomatically, Zack cannot be bound by an arbitration award made in respect to documents said to be contracts but to which it had not given its assent and which run counter to all and sundry the writings submitted to the arbitrator as the real contracts.

AFFIDAVIT OF ANTHONY B. CATALDO
IN SUPPORT OF CROSS-MOTION TO VACATE

Also the arbitrator showed some more of the same partiality complained of in reckoning the amount of the award. Intsel's claim to \$35,253.60 was upon a claim of a sale of 70,888 lbs. of which 60,513 lbs. was allegedly under the June 18, 1969 order and 10,335 lbs. came under the July 21, 1969 order. There was no such amounts ordered and there was and is no contract for such amounts. Even had the arbitrator awarded the amount under the real contracts instead of the incompetent documents which he chose to rely on, he granted more than he could allow under the arbitration agreement. There was no modification for a greater quantity than as shown in the real contracts and no such modification was claimed by Intsel. The arbitrator simply allowed the greater amount anyway.

If it were to be conceded that the deliveries were 5,888 lbs. more than ordered, even so, acceptance would make a new contract for the parties. Such new contract would not be helpful to the arbitrator for the very good reason that arbitration is not permitted under an oral agreement. This distinction escaped the arbitrator. Whether it was overlooked wilfully or negligently, the fact still stands that the arbitrator could not treat with that extra quantity as an arbitrable item. That it do so, proves an exercise of power not granted to him.

AFFIDAVIT OF ANTHONY B. CATALDO
IN SUPPORT OF CROSS-MOTION TO VACATE

Even so, there was never any evidence of the shipment of 70.838 lbs. of aluminum tubes and rods. Instead of September arrival at Detroit, the material was not actually received until December 1969, although the ships had arrived at Detroit late November. Meanwhile Zack's customer had cancelled his contract with Zack and Zack had cancelled with Intsel. These cancellations had occurred in September 1969 when it became apparent that the September deliveries by Intsel would not be made. The evidence of cancellation remains uncontradicted. It was nevertheless disregarded by the arbitrator.

Also, the evidence that upon such late arrival of the goods, Zack rejected them; that Intsel then requested Zack to warehouse the goods and try to sell them for Intsel's account to manufacturers in the Detroit area, and that Zack agreed to work with Intsel in that manner is uncontradicted. Both Mr. Besso and Mr. Romano of Intsel with whom this agreement was made failed to testify. Yet, both admittedly are still in Intsel's employ. A clearer admission of the truth of this oral contract could not be found. Consequently, it is seen that the arbitrator not only exceeded his powers but by the action he took, he appears to have acted arbitrarily in the extreme.

AFFIDAVIT OF ANTHONY B. CATALDO
IN SUPPORT OF CROSS-MOTION TO VACATE

Deponent also objected to the arbitrator chosen and to the fact that Zack was not given a fair chance to name an arbitrator. He objected to the irrelevant evidence and he observed Krasnov's behavior of walking away before his testimony was fully given, in disgust, at the evident show of partiality by the arbitrator. Krasnov's testimony not given was that Mr. Mernick's telex to the mill was not in accordance with his agreement with Krasnov; and that Mernick had been told that Zack was only a broker in the transcript and therefore that time of delivery was expressly agreed between them to be of the essence. By reason of this latter fact, Krasnov told Mernick when delivery was offered in late November that as Fox had covered from other sources and these contracts had been cancelled, the late delivery was rejected.

A. Also, deponent in his opening remarks to the arbitrator stated that there was no arbitration issue respecting the first order for 40,000 lbs. and that the only arbitrable issue could be the lawfulness of Zack's cancellation of the orders for 55,000 lbs. and 10,000 lbs. respectively, even the lawfulness of the cancellation was not in dispute as Intsel did not deny that it failed to deliver in that month as agreed. Even the late delivery remained unexcused and unaccepted and thus it was the proof of Intsel's breach of the contract. This breach was proven by Intsel's own shipping documents and letter to Zack. Consequently, it must be

AFFIDAVIT OF ANTHONY B. CATALDO
IN SUPPORT OF CROSS-MOTION TO VACATE

taken as conceded that delivery was not according to contract. Also, deponent argued to the arbitrator that the oral agreement made with Mr. Besso in December to have Zack take in the goods for resale for Intsel's account was not subject to arbitration. On the hearing, all three of these facets of the case were testified to by respondent without contradiction from Intsel.

Also, deponent called the arbitrator's attention to the provision in the arbitration agreement for the application of New York law. Deponent was apprehensive that the arbitrator would not apply the law. Deponent took pains to call the arbitrator's attention to the wording and stressed the fact that the parties had agreed to New York law to be applicable. Deponent then called the arbitrator's attention to the New York law applicable to the facts of this case as stated in his brief to the arbitrator. A true copy of said brief is attached hereto. The arbitrator stated that he realized that he was to apply New York law but added that he was the sole arbiter of the facts. Deponent replied to this last statement by saying that what facts of a case are, is likewise a question of law. Deponent said that for example, he would probably find that there could not be any evidence contradicting respondent's claims as to what the contract in dispute was, that a cancellation of that contract was effected

AFFIDAVIT OF ANTHONY R. CATALDO
IN SUPPORT OF CROSS-MOTION TO VACATE

because of Intsel's failure to deliver and that Intsel would have to acknowledge that the attempted delivery was both late and unaccepted. Such facts would be binding upon him according to New York law.

These matters were again the subject of deponent's summation after the hearing had ended. This time deponent stressed Intsel's failure to deny the cancellation for cause in September and the declination of the late delivery and the new oral agreement in December to take the goods for storage and resale for Intsel's account. Such failure to deny was an admission of the truth of those matters and that they should be accepted according to the law of New York.

The award is an astonishing document for it flouts the law called to the arbitrator's attention. Besides, the arbitrator was not a business expert but a lawyer and from all that transpired on the hearings, he appeared to be a very knowledgeable lawyer, and quick at assessing the questions arising on the introduction of evidence. There can be no room for a conclusion that he misapplied the law from ignorance.

WHEREFORE, deponent joins his client in the plea to vacate the award and dismiss the claim, or, if any issue of fact appear to the court, that such issue be referred to

AFFIDAVIT OF ANTHONY B. CATALDO
IN SUPPORT OF CROSS-MOTION TO VACATE

a trial before a court and jury.

Sworn to before me this
13th day of February, 1974

ANTHONY B. CATALDO



INTERNATIONAL SELLING CORPORATION
220 EAST 42ND STREET • NEW YORK, N. Y. 10017

TO:

Zack Metal Company
690 Amsterdam Avenue
Detroit, Michigan

Change Order I

TELEPHONE: OXFORD 7-1331
CABLE ADDRESS: INTSEL NEW YORK
INTERNATIONAL TELETYPE: NY 4348 INTLBELL, N. Y.

DATE OF ORDER

CUSTOMER ORDER

OUR CONTRACT

50314 - Zack

MILL ORDER

00132

Date this change 6/23/69

MILL CONFIRMATION

GENTLEMEN:

DATE:

PLEASE BE ADVISED THAT WE HAVE RECEIVED FORMAL MILL ACKNOWLEDGEMENT OF SUBJECT ORDER AND WE CONFIRM HAVING SOLD TO YOU AND YOU HAVING PURCHASED FROM US THE FOLLOWING MATERIAL SUBJECT TO THE TERMS PRINTED ON THE BACK.

YOUR COOPERATION ON VERIFYING ALL DETAILS WILL BE APPRECIATED.

ITEM	DESCRIPTION OF MATERIAL	QUANTITY	SALES PRICE
	As per our cable of January 14, 1969, we have entered 20,000 lbs. against this order. We have now added these 20,000 lbs. to order 50240 and order 50314 should, therefore, be cancelled		
PACKING:			
MARKS:		SHIPMENT	
		TERMS	
		DELIVERY	

AMERICAN RESEARCH CORPORATION
CASE No. 1310-0395-73

NOV 8 1969

No. 2-B
CLAIMANTS' EXHIBIT

(Return to respondent)

ZACK'S EXHIBIT 1

VERY TRULY YOURS,

INTERNATIONAL SELLING CORPORATION

BY: *L. P. Michael*

FORM 8

CUSTOMER'S COPY

M.W. ZACK METAL COMPANY

JUN 20 1969

DEALERS IN

Manufacturers of Steel and Aluminum

TELEPHONE (313) 874-1111

690 AMSTERDAM, DETROIT, MICH. 48202

June 18, 1969

50240
5-318

Mr. Vic Besso
Intsel Corporation
825 Third Avenue
New York, N. Y. 10022

Dear Vic:

In reference to our order #3908 for 201, T451 Hollow Bar,
kindly revise as follows:

✓ 15,000# - 1-3/4 x .312 wall thickness
Shipment as-soon-as-possible.

15,000# - 1-3/4 x .281 wall thickness

15,000# - 1-3/4 x .312 wall thickness

10,000# - 2-1/8 x .250 wall thickness

The above three items we would like September
arrival.

All terms and conditions to apply.

Kindly confirm this for our records.

Yours very truly,

AMERICAN ARBITRATION ASSOCIATION
CASE No. 1310-0715-73

M. W. ZACK METAL COMPANY

NOV 8 1969

Eugene M. Zack
Eugene M. Zack
President

No. 2-A

EMZ/jb CLAIMANTS EXHIBIT

ZACK'S EXHIBIT 2



INTERNATIONAL SELLING CORPORATION
220 EAST 42ND STREET • NEW YORK, N. Y. 10017

TO:

M. J. Zack Metal Co.
690 Amsterdam Avenue
Detroit, Michigan

Change Order IV

TELEPHONE: OXFORD 7-1331
CABLE ADDRESS: INTSEL NEW YORK
INTERNATIONAL TELEX: NY 4248 INTLELL N. Y.

DATE OF ORDER January 13, 1969
CUSTOMER ORDER 3903
OUR CONTRACT 50240 - M. J. Zack
MILL ORDER 80035, 80152
Date this change 6/23/69

MILL CONFIRMATION

DATE:

GENTLEMEN:

PLEASE BE ADVISED THAT WE HAVE RECEIVED FORMAL MILL ACKNOWLEDGEMENT OF SUBJECT ORDER AND WE CONFIRM HAVING SOLD TO YOU AND YOU HAVING PURCHASED FROM US THE FOLLOWING MATERIAL SUBJECT TO THE TERMS PRINTED ON THE BACK.

YOUR COOPERATION ON VERIFYING ALL DETAILS WILL BE APPRECIATED

ITEM	DESCRIPTION OF MATERIAL	QUANTITY	SALES PRICE
	We have placed this order originally for 40,000 lbs. against which we have shipped 10,000 lbs. The balance against this order therefore is 30,000 lbs. The customer wants to increase this order now by 5,000 lbs. and would like to add also the 20,000 lbs. ordered on our 50314/80152 to this order. We have cancelled our 50314/80152 as per today's change order, and the balance of order 50240/80035 should read:		
1.	1-5/8" O.D. x .281 Wall x 14'8-19' length	<u>Lbs.</u> cancelled 15,000	
2.	1-3/4" O.D. x .312	shipped	
3.	1-3/4" O.D. x .201	cancelled 15,000	
4.	2-1/8" O.D. x .312	15,000	
5.	1-3/4" O.D. x .281	15,000	
6.	1-3/4" O.D. x .312	10,000	
7.	2-1/8" O.D. x .250		
	Shipment of item 2 requested A.S.A.P. Shipment of balance requested for September arrival in Detroit		
PACKING:			
MARKS:			
		SHIPMENT	
		TERMS	
		DELIVERY	

1310-0395-73

WJW 3 1969

A

Keep EXHIBIT

VERY TRULY YOURS.

INTERNATIONAL SELLING CORPORATION

BY: H. P. [Signature]

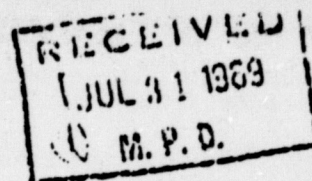
CUSTOMER'S COPY

ZACK'S EXHIBIT 3

FORM 810, 7-61

INTERNATIONAL ASSOCIATION OF AMERICAN
DEALERS IN

non-ferrous scrap and new metal



NO. 5917

690 AMSTERDAM, DETROIT, MICH. 48202

July 29, 1969

BOUGHT OF Intsel Corporation 825 Third Avenue New York, N. Y. 10022

OLD TO

TIME OF SHIPMENT End of October early November at Detroit

WILL SHIP VIA Boat

TERMS OF PAYMENT As Usual

QUANTITY	MATERIAL	PRICE	F. O. B.
10,000#	2017 T 4 x 2-1/2" Rounds ASTM B 211 (not cold finished) Certificate of useage to be furnished by consumer to customs as previously.	@46.2c per lb. Delivered Duty paid	Ex dock Detroit

AMERICAN ASSOCIATION
CASE No. 1310-0395-73

NOV 8 1973

No. 6-A
EXHIBIT

THE SELLER SHALL NOT BE RESPONSIBLE FOR DELAY IN OR FAILURE OF SHIPMENT OR DELIVERY OR FOR DELAYS IN
TRANSPORTATION DUE TO FORCE MAJEURE, STRIKES, DIFFERENCES WITH WORKMEN, ACCIDENTS, FIRE, FLOODS,
MOBILIZATION, WARS, FOREIGN WARS, RIOTS, REVOLUTION, REFFILLIONS, BLOCKADES, GOVERNMENT REQUIREMENTS,
REGULATIONS AND RESTRICTIONS, OR SHORTAGES OF SUPPLIES OR TRANSPORTATION, OR TO ANY CONDITIONS BEYOND
THE CONTROL OF THE SELLER WHETHER OF THE NATURE HEREIN OR NOT. OUR R. R. TRACK SCALE WEIGHTS GOVERN.

ACCEPTED BY

M. W. ZACK METAL CO.

DATED

BY Eugene H. Zack, President

ZACK'S EXHIBIT 4

-52-



INTERNATIONAL SELLING CORPORATION
EAST 42ND STREET • NEW YORK, N. Y. 10017

TO:

Zack Metal Co.
West 57th Street
York, New York

PURCHASED FROM:

Ufalex as agents for
Cegedur

Confirmation of
Cabled Order

TELEPHONE: OXFORD 7-1331
CABLE ADDRESS: INTSEL NEW YORK
INTERNATIONAL TELEX: NY 4348 INTLSSELL, N. Y.

DATE OF ORDER: August 7, 1969
CUSTOMER ORDER 3917
OUR CONTRACT 50617 - Zack
MILL ORDER

SALES AND PURCHASE CONTRACT

DESCRIPTION OF MATERIAL		QUANTITY	PURCHASE PRICE	SALES PRICE
2017-T4 Aluminum Round Rod, Extruded		Lbs.	Per Lb.	Per Lb.
2-1/2" dia. round x 12 ft. length		10,000	.462	.466
In accordance with ASTM B211 but not cold finished No stencilling Submit MTC & A Final destination for insurance: Detroit To be applied against conversion Final user and end use unknown Customer will submit directly to Silvey Shipping necessary documentation for conversion entry Ship, if possible, together with order 50240/005-80563 S.39 Ex Mill				
EXPORT IN CASES OF 2,000 LBS. MAX.				
ZM 3917 2017-T4 Size Net & Gross Lbs. Made in France Detroit No. 1/up				
MEMBER OF THE PECHINEY GROUP				
	PURCHASE	14,000 / 102		SALES
SHIPMENT	Cif Detroit Duty Paid		SHIPMENT	Ex Dock Detroit Duty Paid
TERMS	Net 30 Days		TERMS	Not cash against documents
DELIVERY	S.42 Ex Mill		DELIVERY	Mid Oct. Ex Mill

RECEIVED
CASE NO. 1310-0395-73

NOV 8 1973

No. 6-C
EXHIBIT

ZACK'S EXH. 5

AMERICAN ARBITRATION ASSOCIATION

-----X
In the Matter of the Arbitration between :
INTSEL CORPORATION : ANSWER AND
and : COUNTER CLAIM
M. W. ZACK METAL CO., :
Case No. 1301-1335-73 :
-----X

ANSWERING STATEMENT IN
ARBITRATION PROCEEDINGS
INITIATED BY INTSEL CORP.

M. W. ZACK METAL CO., against whom INTSEL CORPORATION has filed a demand for arbitration makes this answer to the claim of INTSEL CORPORATION.

INTSEL CORPORATION, breached the sales contract referred to in the demand as INTSEL order Nos. 50240 and 50617 in that INTSEL failed to deliver as agreed.

M. W. ZACK METAL CO. does herewith claim that it has suffered damages by reason of said breach of contract by INTSEL CORPORATION by reason of loss of profit and charges paid and incurred in the handling of the material for INTSEL CORPORATION's account for a total of \$7,500.

Dated, New York, N.Y.
August 30, 1973.

Yours etc.,
M. W. ZACK METAL CO.
c/o ANTHONY B. CATALDO
111 Broadway
New York, N.Y. 10006
(212) 962-0065

CATALDO's EXHIBIT 1

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

(same title)

JOHN M. SCHWARTZ, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and am associated with Weil, Gotshal & Manges, the attorneys for the petitioner herein, Intsel Corporation (hereinafter referred to as 'Intsel'). I make this reply affidavit in support of Intsel's petition to confirm the arbitration award in its favor against respondent, M.W. Zack Metal Company (hereinafter referred to as "Zack"), and for an order directing that judgment be entered thereon. I also submit this affidavit in opposition to Zack's "cross-motion" in which it seeks the dismissal of the petition. I am fully familiar with the facts and circumstances set forth herein.

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

2. In its voluminous affidavits in opposition to the petition, Zack has attempted to retry on paper the entire arbitration proceeding and has purported to present its own account of what occurred at the hearing and what evidence was presented. It is Intsel's position that the parties having agreed to arbitration and Zack having participated fully in the arbitration proceeding, the factual and legal issues on the merits of Intsel's claim may not be reopened. Therefore, so as not to burden the Court with voluminous papers which are irrelevant to the issues in this proceeding, Intsel does not submit herewith its own detailed account of its case before the arbitrator and the evidence that was presented. However, if this court should determine that such material is necessary and relevant, Intsel respectfully requests an opportunity to prepare and submit such affidavits. Suffice it to say for the present, however, that the account of the arbitration hearing which has been submitted by Zack herein is grossly distorted and factually incorrect in many respects, especially in its misrepresentation of Intsel's positions and evidence.

3. There are, however, several matters raised in Zack's papers which require correction and response, since the statements made therein with respect to these matters

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

are almost entirely false, and in some cases scandalous. Therefore, I will direct my attention in this affidavit to (1) the preliminary proceedings in arbitration prior to the hearing, (2) the conduct of the hearing, (3) the contracts which were submitted to the arbitrator as the basis for Intsel's claim and upon which the award was based, and (4) the computation of damages.

COMMENCEMENT OF THE ARBITRATION
PROCEEDING AND SELECTION OF THE
ARBITRATOR

4. In its answering papers, Zack's attorney contends that Zack was not given an opportunity to select an arbitrator and that the arbitrator, Mark A. Buckstein, Esq., was "the choice of the petitioner" and was therefore not neutral. To demonstrate how baseless this allegation is, I will briefly set forth the events which led up to the hearing.

5. Prior to the commencement of the arbitration proceeding, I had had some correspondence with respect to Intsel's claim with Zack's attorneys, the firm of Thomas & Zack, Esquires of Southfield, Michigan. I was dealing not with the Mr. Zack of that firm but with Robert Thomas, Esquire. Since this correspondence failed to resolve the dispute, I advised Mr. Thomas of our intention to commence proceedings and on April 12, 1973. I prepared and sent to Zack by certified mail, return receipt requested, a demand for arbitration, a copy of which is annexed hereto as

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

Exhibit A. On or about April 16, 1973, I filed 3 copies of the Demand for Arbitration with the New York office of the American Arbitration Association (hereinafter referred to as the "AAA"), together with copies of the two contracts referred to in the Demand.

6. The demand for arbitration recited in full the arbitration clause of the contracts and described the dispute as follows:

"Claim for goods sold and delivered
under Intsel Contracts #50240 and
#50617"

The relief sought was described as follows:

"#50240	\$30,548.16	
"#50617	4,795.44	
	<u>\$35,253.60</u>	in damages plus interest"

Pursuant to Section 7503 (c) of the New York Civil Practice Law and Rules (as it was in effect prior to its amendment as of September 1, 1973), the Demand contained the following prominent notice:

" PLEASE TAKE FURTHER NOTICE, that unless within ten days after service of this Notice of Intention to Arbitrate, you apply to stay the arbitration herein, you shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time."

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

7. At no time thereafter did Zack or any attorney on its behalf apply to stay the arbitration or object that a valid agreement to arbitrate had not been made or had not been complied with. However, shortly after I had served the Demand for Arbitration, I received a copy of a letter from Mr. Thomas, Zack's attorney, to the AAA, dated April 18, 1973, requesting that the arbitration proceeding be transferred to Detroit. A copy of this letter, together with my written response thereto, is annexed hereto as Exhibit B.

8. With its letter to both attorneys dated May 9, 1973, a copy of which is annexed hereto as Exhibit C, the AAA enclosed a list of names selected from its panel of arbitrators. Both parties were asked to cross out the names of any proposed arbitrators that were unacceptable, to mark the remaining names in order of preference and to return them to the AAA. On May 21, 1973, I returned this list to the AAA, having crossed out one name and marked the remaining 5 names in the order of Intsel's preference. A copy of the list of proposed arbitrators, exactly in the form in which I returned it to the AAA is annexed hereto as Exhibit D. In view of Zack's completely unfounded allegations herein that the arbitrator was selected by Intsel, it is notable that on the list I returned to the AAA, Mark A. Buchstein, Esq., who

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

ultimately became the arbitrator, was designated as Intuel's fifth choice out of six possible names.

9. On May 30, 1973, the AAA sent a letter to both parties (a copy of which is annexed hereto as Exhibit E), denying Mr. Thomas' request for a change of locale of the proceeding and indicating that if Zack did not return the list of arbitrators by June 6, 1973, all names therein would be deemed acceptable. To my knowledge, neither Zack nor its attorney ever returned the list of arbitrators. On June 18, 1973, the AAA advised both parties in writing (annexed hereto as Exhibit F) that Mr. Buckstein had been appointed as arbitrator. Thereafter, in June, 1973, Anthony B. Cataldo, Esq., apparently replaced Mr. Thomas as Zack's attorney and requested that the hearing be postponed. Mr. Cataldo and I appeared together before the arbitrator, Mr. Buckstein, who granted Mr. Cataldo's request and postponed the hearing from July 20, 1973 to September 11, 1973. Mr. Cataldo made no objection at that time to Mr. Buckstein serving as arbitrator.

10. The hearing was postponed once again because of my own serious illness and finally took place on November 8, 1973, at the offices of the AAA in New York. On the day of the hearing, Mr. Cataldo raised for the first time his objection to the fact that he personally had not participated in the selection of the arbitrator. The staff

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

member of the AAA present at the hearing confirmed that Zack and its attorneys had been given an opportunity to participate in the selection and had neglected to do so, and the hearing proceeded. At no time, to my knowledge, did Zack or its attorney request that stenographic record be made of the hearing, as permitted by the rules of the AAA.

11. The implication, which appears at several points in Zack's answering papers, that there was some connection between Intsel or its attorneys and the arbitrator, or that some undue influence was exerted upon him, is completely unfounded. Although prior to the commencement of the arbitration proceeding I had heard of Mr. Buckstein's law firm, Baer & Marks, and understood it to have a high reputation, I had never met or heard of Mr. Buckstein and I am advised by the executives of Intsel who were involved with this case that they had never heard of him either. Neither before, during or since the arbitration hearing did I or, to my knowledge, any Intsel personnel have any contact whatsoever with Mr. Buckstein, except those at which Zack's attorney was present.

THE CONDUCT OF THE ARBITRATION
HEARING

12. Zack accuses the arbitrator of bias and mis-

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

conduct. The only factual allegation presented to support these very serious charges, however, seem to be (1) that the arbitrator himself directed questions to Zack's witness, sometimes in "a stern voice", (2) that the arbitrator admitted into evidence certain documents over the objection of Zack's attorney, (3) that on some occasions during the hearing the arbitrator "slyly smiled," and (4) that the arbitrator ultimately decided the case adversely to Zack. It is respectfully submitted that none of these constitute any evidence of bias or misconduct to support Zack's challenge of the award and are irrelevant to this proceeding. I do not propose to respond to Zack's purported blow-by-blow account of the arbitration hearing. It is patently improper for a challenge to an arbitration award to be based on such an account where no stenographic transcript was made of the hearing. However, since that account contains matters which are totally false and, indeed, libelous to the arbitrator, some comment is necessary.

13. It was my impression that the arbitrator displayed complete impartiality throughout the hearing and an even-handed approach to the admission of evidence. Within the framework of the Commercial Arbitration Rules of the AAA, which provide that the Arbitrator shall be the judge of

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

the relevancy and materiality of the evidence offered and that conformity to legal rules of evidence is not required, he denied admission of certain documents which I presented and accepted others. Although not required by the Rules to follow any particular procedure, he permitted Intsel and then Zack to present all their witnesses and to cross-examine those of the other side, permitted opening addresses and closing summations by counsel and occasionally questioned the witnesses himself for clarification. If he gave any indication during the hearing of any partiality toward one side or the other, it was not apparent to me.

THE CONTRACTS UPON WHICH INTSEL
COMMENCED ARBITRATION

14. In support of its argument that this arbitrator is guilty of misconduct, Zack contends that the contracts upon which the arbitration was commenced, and upon which Intsel asserted its claim, were not the true contracts between the parties. This argument was presented at length at the hearing and, of course, was an issue for the arbitrator to determine. However, for the sake of clarity and to assist the court in determining the merit of Zack's argument, I will set forth below a summary of the writings which were before the arbitrator and which together con-

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

stitute the contracts, as amended. As indicated in Intsel's original Demand for Arbitration (Exhibit A annexed hereto), Intsel sought arbitration with Zack on two contracts designated Nos. 50240 and 50617. Each of these contracts was amended in writing several times.

15. Contract #50240, as amended, consisted of the following documents:

(a) Original Zack Purchase Order #3908, dated January 7, 1969, for 40,000 pounds of aluminum hollow bar at \$.503 per pound, marked Claimant's Exhibit 1-A at the hearing and annexed hereto as Exhibit G.

(b) Intsel Sales and Purchase Contract designated #50240, dated January 13, 1969, for 40,000 pounds of hollow bar at \$.503 per pound, marked Claimant's Exhibit 1-B at the hearing and annexed to Intsel's petition herein as Exhibit A. Evidence was presented at the hearing that a form bearing a carbon copy of these terms of the sale to Zack, as well as the arbitration clause on the back, was sent to Zack.

(c) Several written amendments of specifications, of "Change Orders," were referred to at the hearing but were not relevant to the issues involved and were not introduced into evidence.

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

(d) Zack's written request, dated June 18, 1969, to revise its original order #3908 to cover 55,000 pounds of hollow bar, of different specifications, marked as Claimant's Exhibit 2-A at the hearing and annexed to the answering affidavit of Eugene M. Zack herein as Exhibit 2.

(e) Intsel's "Change Order IV" to contract 50240, dated June 23, 1969, amending the original order as Zack requested to 55,000 pounds at different specifications and noting that 10,000 pounds had been already shipped. Part of this 55,000 pounds was transferred to this contract from another previous order Zack had placed with Intsel- #50314 - which was now combined with #50240. Contract 50314 could then be cancelled, as noted on the Change Order. Since no price change is indicated, the price remained at \$.503 per pound as in the original contract. Intsel's copy of this June 23, 1969 Change Order was marked Claimant's Exhibit 2-B at the hearing. The copy which Zack received was marked Respondent's Exhibit A at the hearing and is annexed to the affidavit of Eugene M. Zack herein as Exhibit 3. In annexing the Change Order to his answering papers, however, Zack's attorney neglected to provide a copy of the reverse side, which again contains the arbitration clause.

16. To the extent I understand Zack's argument, it seems to contend that Zack's June 18, 1969 letter and

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

Intsel's June 23, 1969 Change Order, rather than modifying Contract 50240, terminated it and created a new contract. Of course, this is contradicted by their very terms which repeatedly use the words "revise," "change" "increase" etc. retain the original purchase order and contract numbers and omit statement of price or terms. In any event, whether the June 23, 1969 Change Order is considered a modification or a new contract, it is undisputed that ultimately the contract provided for the sale of 55,000 pounds of hollow bar at \$.503 per pound. (Mr. Cataldo, on page 9 of his affidavit submitted herein, incorrectly states the price to be \$.4845. He has erroneously used Intsel's purchase price from its supplier rather than its sales price to Zack).

17. Contract #50617 consisted of the following documents:

(a) Zack's written purchase order #3917 dated July 29, 1969, for 10,000 pounds of aluminum round rods at \$.462 per pound, marked Claimant's Exhibit 6-A at the hearing and annexed to the affidavit of Eugene M. Zack as Exhibit 4.

(b) A letter from Zack's New York Agent Mr. Krasnov, dated August 5, 1969, changing the price from \$.462 to \$.464 per pound, marked as Claimant's Exhibit 6-B at the hearing and annexed hereto as Exhibit H.

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

(c) Intsel's Sales and Purchase Contract designated #50617, dated August 7, 1969, for 10,000 pounds of aluminum round rods at \$.464 per pound, marked Claimant's Exhibit 6-C at the hearing and annexed to Intsel's petition herein as Exhibit B (Zack's attorney states, on page 2 of its memorandum of law, that this document was not introduced into evidence; although the copy annexed to the petition does not bear the arbitrator's exhibit stamp, it is a carbon copy of the document marked Exhibit 6-C). Evidence was presented at the hearing that a form bearing a carbon copy of these terms of the sale to Zack, as well as the arbitration clause on the back, was sent to Zack.

(d) Intsel's "Change Order I" to contract #50617, dated September 9, 1969, amending the specifications of the order, but leaving all other terms and conditions unchanged, marked Claimant's Exhibit 7-A at the hearing and annexed hereto as Exhibit I.

18. Although, Zack's attorney makes some general statements that this contract is not the true contract of the parties, at other points he concedes that it is the contract (Mr. Cataldo's affidavit, pages 8 and 9). In any event, it does not appear that Zack denies that there was a contract for 10,000 pounds of aluminum round rods at a price of \$.464 per pound.

19. It is appropriate at this point to refer to

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

Zack's various allegations that these contracts were orally "cancelled" before delivery or that there was an oral agreement at the time of delivery that Zack was accepting the goods conditionally. These allegations were made during the hearing and were vigorously opposed by Intsel. In fact, the documentary evidence submitted by both sides tended to indicate that the contracts had never been cancelled and that Zack had accepted delivery and retained the goods. The repeated assertions by Zack and its attorney that their allegations on these matters were "conceded" by Intsel is absolutely false and an unconscionable distortion of what occurred at the hearing.

THE COMPUTATION OF DAMAGES

20. Zack argues that the damages of \$35,253.60 awarded by the arbitrator were excessive. On the contrary, the damages, as claimed by Intsel in its Demand for Arbitration and awarded by the arbitrator, were based precisely on the quantity of goods delivered against the orders and accepted and retained by Zack. At the hearing, evidence was presented to indicate that immediately before delivery Intsel asked Zack if pursuant to common practice in the industry it would accept slight overages on the orders and that Zack indicated its approval. The invoice prices were

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

calculated as follows:

<u>CONTRACT</u>	<u>POUNDS ORDERED</u>	<u>POUNDS SHIPPED</u>	<u>PRICE PER POUND</u>	<u>TOTAL PRICE</u>
50240	55,000	50,553	\$.503	\$30,458.16
50617	10,000	10,335	\$.464	<u>4,795.44</u>
TOTAL CLAIM				<u><u>\$35,253.60</u></u>

CONCLUSION

21. Zack having presented no credible evidence of impropriety in the conduct of the arbitration proceeding, it should not be permitted to relitigate the factual issues of the original claim, simply because it is unhappy with the result. The purpose of arbitration is to avoid litigation and provide an efficient and speedy resolution of commercial disputes. Zack should not be permitted to frustrate this purpose by its frivolous attacks herein on Intsel, the arbitrator and the AAA. This Court should confirm the award of the arbitrator and award judgment thereon.

JOHN M. SCHWARTZ

SWORN TO BEFORE ME
THIS 15th DAY OF MARCH, 1974

NOTARY PUBLIC

American Arbitration Association

FOR USE
IN
NEW YORK
STATE

COMMERCIAL ARBITRATION RULES

DEMAND FOR ARBITRATION

DATE: April 12, 1973

TO: (Name) M. W. Zack Metal Company
(of party upon whom the Demand is made)

(Address) 21006 Coolidge

(City and State) Oakpark, Michigan 48237

Named claimant, a party to an arbitration agreement contained in written contract,

dated 1/13/69 and 8/7/69, providing for arbitration, hereby
demands arbitration thereunder.

(attach arbitration clause or quote hereunder)

Any controversy arising under or in relation to this contract or any modification thereof shall be settled by arbitration in the City of New York in accordance with the Arbitration Laws of the State of New York and the Rules then obtaining of the American Arbitration Association, and judgment on the award may be entered in any court, State or Federal, having jurisdiction.

Claim for goods sold and delivered under Intsel Contracts
#50240 and #50617.

CLAIM OR RELIEF SOUGHT: (amount, if any)

#50240	\$30,458.16	
#50617	4,795.44	
Total -	\$35,253.60	in damages plus interest

PLEASE TAKE FURTHER NOTICE, that unless within ten days after service of this Notice of Intention to Arbitrate, you apply to stay the arbitration herein, you shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time.

HEARING LOCALE REQUESTED: New York, New York

(City and State)

You are hereby notified that copies of our arbitration agreement and of this demand are being filed with the American Arbitration Association at its New York, New York Regional Office, with the request that it commence the administration of the arbitration. Under Section 7 of the Commercial Arbitration Rules, you may file an answering statement within seven days after notice from the Administrator.

WEIL, GOTSHAL & MANGES

Signed by John M. Schwartz

(May be Signed by Attorney)

Name of Claimant INTSEL CORPORATION
c/o Weil, Gotshal & Manges

Address (to be used in connection with this case) 767 Fifth Avenue
New York, New York 10022

City and State Att: John M. Schwartz

Telephone (212) 758-7800

To institute proceedings, please send three copies of this Demand with the administrative fee, as provided in Section 47 of the Rules.

SCHWARTZ'S EXHIBIT A

THOMAS AND ZACK
ATTORNEYS AND COUNSELLORS AT LAW
22255 GREENFIELD ROAD • SUITE 432
SOUTHFIELD, MICHIGAN 48075

April 18, 1973

TELEPHONE
355-4200
AREA CODE 313

American Arbitration Association
140 West 51st Street
New York, New York 10020

RE: Intsel Corporation vs. M/W. Zack Metal Co., Inc.

Dear Sir:

Please be advised that this firm represents M. W. Zack Metal Company, Inc. The president of the company, Mr. Eugene Zack, sustained a serious heart attack in June, 1972. Since that time he has been under continual doctor's care and is precluded from doing any traveling whatsoever. Consequently, I request that this matter be transferred to the American Arbitration Association regional office in the City of Detroit.

Thank you for your attention and cooperation in this matter.

Very truly yours,

ROBERT THOMAS

RT/jl

✓cc: Mr. John N. Schwartz
767 5th Avenue
New York, New York 10022

SCHWARTZ'S EXHIBIT B.

-71-

MAILED }
DEL'Y } By

W. G. & M.

April 23, 1973

BY HAND

American Arbitration Association
140 West 51st Street
New York, New York 10020

Re: Intsel Corporation v.
M. W. Zack Metal Co., Inc.

Gentlemen:

We have received a copy of the letter dated April 18, 1973 addressed to you by Thomas and Zack, Esquires, the attorneys for the respondent, M. W. Zack Metal Co., Inc., in which they request that this matter be transferred to the American Arbitration Association regional office in Detroit, Michigan.

On behalf of Intsel Corporation, we oppose such a transfer. Pursuant to Section 10 of the Commercial Arbitration Rules of the Association, the parties have already agreed on the locale of the arbitration. The sales contracts upon which the claim of Intsel Corporation is based specifically provides that any controversy arising under the contract shall be settled "by arbitration in the City of New York in accordance with the Arbitration Laws of the State of New York...."

SCHWARTZ'S EXHIBIT B cont.
-71a-

MAILED }
DEL'Y } By

American Arbitration Association
April 23, 1973
Page 2

W., G. & M.

The change of locale would cause great difficulties and expense to Intacl, since all the prospective witnesses it may call are here in the New York area. On the other hand, we believe the reference by the respondent's attorney to a heart attack suffered by an officer of the respondent last June is insufficient to warrant overriding the express provisions of the arbitration agreement.

We respectfully submit that the application contained in the Thomas and Zack letter of April 18, 1973 be denied.

Very truly yours,

WEIL, GOTSHAL & MANGES

By

John M. Schwartz

JMS/im

cc: Robert Thomas, Esq.

SCHWARTZ'S EXHIBIT B cont.

-71b-



AMERICAN ARBITRATION ASSOCIATION 140 WEST 51 STREET, NEW YORK, N. Y. 10020

(212) 582-6620

NT E. MEADE

rk Region

May 9, 1973

RE: 1310-0395-73
INTSEL CORPORATION
AND
M. W. ZACK METAL COMPANY

Intsel Corporation
c/o Weil, Gotshal and Manges, Esqs.
Att: John M. Schwartz, Esq.
767 Fifth Avenue
New York, New York 10022

Thomas and Zack, Esqs.
Att: Robert Thomas, Esq.
Attorney for Respondent
22255 Greenfield Road
Suite 432
Southfield, Michigan 48075

Gentlemen:

This will acknowledge receipt on April 18, 1973 from Claimant's Attorneys Weil, Gotshal and Manges, Esqs., of a Demand for Arbitration of a controversy arising out of a contract between the above-named Parties, containing a clause providing for administration by this Association. We understand that a copy was sent to Respondent. A copy of our Commercial Arbitration Rules is enclosed.

This will also acknowledge receipt of a letter dated April 18, 1973 from Robert Thomas, Esq., Attorney for the Respondent, a copy of which is enclosed herewith for Claimant. The Association at this time requests the written comments of Mr. Schwartz to the above-mentioned letter by on or before May 23, 1973.

The attention of Respondent is directed to Section 7. If Respondent does not answer by on or before May 23, 1973 we will assume that the claim is denied. If Respondant wishes to counterclaim, file two copies of such and send an additional copy of the counterclaim to Claimant.

SCHWARTZ'S EXHIBIT C

-72-

In accordance with Section 12 of the Rules, the Association encloses herewith a list of names selected from its panels from which arbitrators are to be appointed, and calendar forms to ascertain your available dates for hearing, as well as the time you anticipate will be necessary to present your case. If the list is not returned by on or before May 23, 1973, the appointment of one (1) Arbitrator will be made as authorized in Section 12.

Very truly yours,

William O'Hara

WILLIAM O'HARA
Tribunal Administrator

WO'H:go;b
Encls.

SCHWARTZ'S EXHIBIT C cont.

-72a-

American Arbitration Association

WO'H:go'b 5-9-73 **COMMERCIAL ARBITRATION RULES**

In the Matter of the Arbitration between

INTSEL CORPORATION

AND

M. W. ZACK METAL COMPANY

CASE NUMBER: 1310-0395-73

LIST SUBMITTED TO THE PARTIES

To: Claimant and Respondent

Please indicate by number your order of preference upon this list of proposed Arbitrators. You may strike out names that are not acceptable but please leave as many names as possible.

3 BAKER, Edward A., Esq.

Deals with corporate law.

5 BUCKSTEIN, Mark A., Esq.

Baer and Marks--Familiar with litigation in corporate.

2 FIELDMAN, Henry J., Esq.

Asst. Counsel-The Babcock & Wilcox Company--Deals with corporate law.

4 PANITZ, Lawrence H., Esq.

Counsel-W. R. Grace & Co.- Deals with corporate law and financial.

~~PRATT, James E., Esq.~~

~~Assoe. Van Alstyne, Noel & Co. Gen. practice. Experience in savings bank.~~

1. PURVIS, Edmund S., Esq.

Couns.-Coats & Clark, Inc.- Deals with broad range of general corporate problems.

DATED: May 21, 1973

NOTICE:

Signed

On behalf of

WEIL, GOTSHAL & MANGES

By: John M. Schwartz
Intsel Corporation

May 23, 1973

1. This List is returnable to the Tribunal Administrator on or before
2. Unless this List is received by the Tribunal Administrator within the time specified, all persons named herein shall be deemed acceptable.
3. If the Parties fail to agree upon any of the names, or if those named decline or are unable to act, or if for any other reason the appointment cannot be made from the submitted List, the Administrator is authorized to make the appointment from other members of the Panels.



AMERICAN ARBITRATION ASSOCIATION 140 WEST 51 STREET, NEW YORK, N. Y. 10020

(212) 582-6620

MEADE

region

May 30, 1973

RE: 1310-0395-73
INTSEL CORPORATION
AND
M. W. ZACK METAL COMPANY

Intsel Corporation
c/o Weil, Gotshal and Manges, Esqs.
Att: John M. Schwartz, Esq.
767 Fifth Avenue
New York, New York 10022

Thomas and Zack, Esqs.
Att: Robert Thomas, Esq.
Attorney for Respondent
22255 Greenfield Road
Suite 432
Southfield, Michigan 48075

Gentlemen:

This will acknowledge receipt of letters dated April 18, 1973 from Mr. Thomas and a letter dated April 23, 1973 from Mr. Schwartz. On the basis of this correspondence, the association has ruled that New York City be the site for hearings.

Inasmuch as Respondent has not returned the list of respective Arbitrators, he has an additional seven days to do so. If we do not receive the list by on or before June 6, 1973, all names thereon will be deemed acceptable.

Very truly yours,

William O'Hara
William O'Hara
Tribunal Administrator

WO'H:go'b

SCHWARTZ'S EXHIBIT E

-74-



AMERICAN ARBITRATION ASSOCIATION 140 WEST 51 STREET, NEW YORK, N. Y. 10020

(212) 582-6620

E. MEADE

Region

June 18, 1973

RE: 1310-0395-73
INTSEL CORPORATION
AND
M. W. ZACK METAL COMPANY

Intsel Corporation
c/o Weil, Gotshal and Manges, Esqs.
Att: John M. Schwartz, Esq.
767 Fifth Avenue
New York, New York 10022

Thomas and Zack, Esqs.
Att: Robert Thomas, Esq.
Attorney for Respondent
22255 Greenfield Road
Suite 432
Southfield, Michigan 48075
AIR MAIL

Gentlemen:

This will serve to advise the Parties that we have appointed Mark A. Buckstein as Arbitrator in the above-captioned matter from the list submitted by Claimant.

Enclosed herewith please find calendar forms for the months of July and August. We ask that the Parties and the Arbitrator please complete and return said forms to the undersigned by on or before June 25, 1973. If the forms are not returned by said date, we will proceed with the scheduling of a hearing.

Very truly yours,

William O'Hara
William O'Hara
Tribunal Administrator

WO'H:go'b
Encl.
CC: Arbitrator

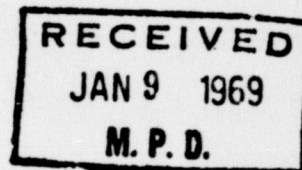
SCHWARTZ'S EXHIBIT F

-75-

M.W. ZACK METAL COMPANY

DEALERS IN

new for new soap  *and new metal*



TELEPHONE (313) 874-3111

690 AMSTERDAM, DETROIT, MICH. 48202

January 7, 1969

International Selling Corporation
220 East 42nd Street
New York, N. Y. 10017

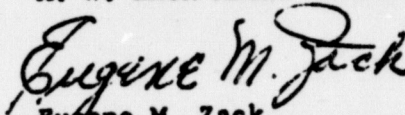
Attn: Mr. William V. Mernick, Manager
Mill Product Sales

Dear Mr. Mernick:

Enclosed you will find our order No. 3908 for 40,000 lbs. of
2017-T451 Aluminum Hollow Bar, at .503 cents per lb., ex-dock,
duty-paid.

Yours very truly,

M. W. ZACK METAL COMPANY


Eugene M. Zack
President

EMZ/jb

Enclosed

AMERICAN ARBITRATION ASSOCIATION
CASE No. 1 J10-0375-73

NOV 8 1973

No. 1-A
CLAIMANT'S EXHIBIT

SCHWARTZ'S EXHIBIT G

M.W. ZACK METAL COMPANY

DEALERS IN

non-ferrous scrap  *and new metal*

3908

690 AMSTERDAM, DETROIT, MICH. 48202

January 7, 1969

BOUGHT OF International Selling Corporation, 220 East 42nd Street, New York, N. Y. 10017

OLD TO

TIME OF SHIPMENT 12 Weeks

ALL SHIP VIA

TERMS OF PAYMENT As Usual

QUANTITY	MATERIAL	PRICE	F. O. B.
	2017-T451 Aluminum Hollow Bar	@.503 cents	Detroit
10,000 lbs.	1-5/8" O.D. x .281" wall thickness x 14.8" min.	per lb.,	
	to 19' max.	ex-dock,	
10,000 lbs.	1-3/4" O.D. x .312" wall thickness x " "	duty-paid	
10,000 lbs.	1-3/4" O.D. x .281" wall thickness x " "		
10,000 lbs.	2-1/8" O.D. x .312" wall thickness x " "		

AMERICAN ARBITRATION ASSOCIATION
CASE No. 1310-0395-73
NOV 8 1970
No. 1-4
CLAIMANTS EXHIBIT

THE SELLER SHALL NOT BE RESPONSIBLE FOR DELAY IN OR FAILURE OF SHIPMENT OR DELIVERY OR FOR DELAYS IN TRANSPORTATION DUE TO FORCE MAJEURE, STRIKES, DIFFERENCES WITH WORKMEN, ACCIDENTS, FIRE, FLOODS, MOBILIZATION, WARS, FOREIGN WARS, RIOTS, REVOLUTION, REBELLIONS, BLOCKADES, GOVERNMENT REQUIREMENTS, REGULATIONS AND RESTRICTIONS, OR SHORTAGES OF SUPPLIES OR TRANSPORTATION, OR TO ANY CONDITIONS BEYOND THE CONTROL OF THE SELLER WHETHER OF THE NATURE HEREIN OR NOT. OUR N. Y. TRACK SCALE WEIGHTS GOVERN.

ACCEPTED BY _____

M. W. ZACK METAL CO.

BY _____

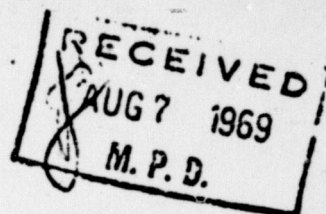
BY Eugene M. Zack

Eugene M. Zack, President

SCHWARTZ'S EXHIBIT G cont.

M. W. ZACK METAL COMPANY

250 WEST 57TH STREET
NEW YORK 19, NEW YORK



TELEPHONE
ZA 7-6410

CABLE ADDRESS
ZACKMET

August 5, 1969

Mr. Steve Pavey
Intsel Corporation
825 Third Avenue
New York, N.Y. 10022

Dear Steve,

This will confirm our approval of the change in price on order # 3917 for 10,000 # of Aluminum Rod 2017 T 4 from 46.2 to 46.4¢ per pound delivered Detroit. duty paid.

Again, will you try to impress on the mill that shipment be made together with the Hollow Bar the week of September 22nd, if it is at all possible.

Many thanks.

Yours very truly,

M. W. ZACK METAL CO.

Edward E. Arasnov

old
clock Detroit DP
Mr.

AMERICAN ASSOCIATION OF AGENTS
CASE No. 1310-0395-73

NOV 8 1973

No. 6-B
cl. EXHIBIT

SCHWARTZ'S EXHIBIT H
-77-



INTERNATIONAL SELLING CORPORATION
EAST 42ND STREET • NEW YORK, N. Y. 10017

TO:
Zack Metal Co.
West 57th Street
York, New York

PURCHASED FROM:
Ufalax as agents for
Cegedur

TELEPHONE: OXFORD 7-1331
CABLE ADDRESS: INTSEL NEW YORK
INTERNATIONAL TELEX: NY 4348 INTLSLL N. Y.

DATE OF ORDER August 7, 1969
CUSTOMER ORDER 3917
OUR CONTRACT 50617 - Zack
BILL ORDER 83914

Change Order I

Change Order I

Date this change 9/9/69

SALES AND PURCHASE CONTRACT

DESCRIPTION OF MATERIAL		QUANTITY	PURCHASE PRICE	SALES PRICE
As per our cable of September 2, 1969, please change specification				
from: ASTM - B211				
to: ASTM - B221				
All other terms and conditions remain unchanged				
G:		<div>AMERICAN ARBITRATION ASSOCIATION CASE No. 1310-03915-73 NOV 6 1970 No. 7-A EXHIBIT</div>		
MEMBER OF THE PECHINEY GROUP				
		PURCHASE	SALES	
SHIPMENT			SHIPMENT	
TERMS			TERMS	
DELIVERY			DELIVERY	

ARTZ'S EXHIBIT I
-78-

ZACK'S
REPLY AFFIDAVIT IN SUPPORT OF
CROSS-MOTION TO VACATE

(same title)

EUGENE M. ZACK, being duly sworn deposes and says that this affidavit is made to supplement his affidavit verified February 20, 1974 in support of respondent's motion to vacate the award. With reference to Exhibit 1 of his affidavit that speaks of adding 20,000 pounds of the tubing to Zack's purchase order dated June 18, 1969, said exhibit was offered to show that Zack Metal never got a copy of Intsel's confirmation of its own purchase to its mill and to how the difference in wording between Intsel's confirmation of purchase to its mill and its confirmation of sale to Zack. This corrects the statement in the previous affidavit that Exhibit 1 was as shown on this exhibit and not on Exhibit A.

Exhibit 5 attached to deponent's affidavit is not Intsel's confirmation of its sale to Zack either. It is again like Exhibit A to the petition, Intsel's confirmation of purchase from its mill. Attached hereto is a true copy of the only sales confirmation received by Zack from Intsel. It is dated August 7, 1969, and marked Exhibit 6. Note that the form is like Exhibit 1 and Exhibit 3 but dealing with different material. These three forms are the only records Zack has of Intsel's confirmation of sale. There was one dated January 7, 1969 which is confirmed by Intsel in their recent papers, but that was of the first order of 40,000 pounds. Zack had a

ZACK'S
REPLY AFFIDAVIT IN SUPPORT OF
CROSS-MOTION TO VACATE

fire on its premises in 1971. That probably accounts for the fact that Zack does not have a copy of that confirmation dated January 7, 1969. It should be of the same form as Exhibits 1, 3, and 6. If it is it will be Intsel's sales confirmation to Zack for the 40,000 pounds ordered in December 1968. This confirmation together with the December purchase order make up the first contract of the parties. The Exhibit "A" upon which the award was alleged made was not a part of this first contract but as Mr. Fifield testified it is Intsel's purchase confirmation of its purchase from its mill and hence the award was not based upon a contract Intsel had with Zack. How can a neutral arbitrator, knowledgeable in the law make an award against Zack upon a document never seen nor sent to Zack and which is apparently not the contract at all. That is the question posed for this court's consideration.

Similarly, Zack was told at the hearing that Intsel's proffer of what was marked as Exhibit 5 was exactly the same as the confirmation of sale Intsel had sent to Zack. Yet, it was, in fact, Intsel's confirmation to its mill in respect of Zack's purchase order dated July 29, 1969. Without more Exhibit 5 was marked in evidence. The discrepancy was not noticed until a comparison was made of the exhibits attached to the affidavit of February 20, 1974 with the originals

ZACK'S
REPLY AFFIDAVIT IN SUPPORT OF
CROSS-MOTION TO VACATE

which comparison was made after the affidavit had been filed with the court. This is an effort to correct the facts. The attached Exhibit 6 is the one and only time a confirmation by Intsel of its sale to Zack was made and Exhibit 5 is a document marked in reliance upon misleading representations made by petitioner at the hearing. Also, it is a document which was never seen or agreed to by Zack. Nor does it contain an obligation by Zack. Mr. Fifield testified that it was a confirmation of Intsel's purchase and that it was neither sent to Zack nor was it discussed with Zack.

Another fact provable by document in Intsel's possession is that when Intsel attempted the late delivery of the goods in late November, early December, 1969, the invoice accompanying the shipping documents were marked "net cash vs. our shipping documents". Yet, the delivery was made free of this requirement of payment. Intsel's freight forwarder Silver Shipping Company would not have given up the goods unless it had gotten instructions from Intsel to waive the payment requirement. The fact of non-payment and the fact of delivery are accomplished facts which corroborate deponent's testimony that there was no acceptance of the goods under the contracts but, instead, there was an oral agreement to warehouse the goods for Intsel's account which superseded all prior agreements of the parties. Attached hereto, as Exhibit 7, is a true copy of one of the invoices, so that,

ZACK'S
REPLY AFFIDAVIT IN SUPPORT OF
CROSS-MOTION TO VACATE

this court may see for itself the legend about cash payment. Such a provision as calling for a cash payment and the fact of its waiver, supports deponent's claim that Zack stored the goods under a new oral agreement which superseded all previous agreements, a fact which is even now not denied. The oral agreement testified to by deponent was actually made and the parties acted upon it and it is the controlling agreement which was unlawfully ignored by the arbitrator. Under it, there is nothing due petitioner, instead respondent should be reimbursed for its expenses as set forth in the counterclaim.

Sworn to before me this
19th day of March 1974.

EUGENE M. ZACK

REPLY AFFIDAVIT OF ANTHONY B. CATALDO
IN SUPPORT OF CROSS-MOTION TO VACATE
AWARD

(same title)

ANTHONY B. CATALDO being duly sworn deposes and says that this affidavit is made in reply to the petitioner's

CATALDO'S
REPLY AFFIDAVIT IN SUPPORT OF
CROSS-MOTION TO VACATE AWARD

papers in opposition. Actually such opposition papers do not propose any valid denial of the applicability of the reasons for vacating the award contained in respondent's brief. They even add to their own deficiencies by their omission and failures to meet the major points of respondent's attacks upon the award. Two major shortcomings are: a), that they do not differentiate between the contract of sale and the contract to arbitrate and, b), they fail to recognize the difference in legal effect between writings in evidence and claims to an ultimate fact said to be established solely by oral evidence:

POINT I

a) THE DIFFERENCES BETWEEN THE
CONTRACT OF PURCHASE AND SALE
AND THE ARBITRATION AGREEMENT.

Petitioner cannot justify its position before the court by saying that an arbitration agreement, if in writing, though not signed, is valid; nor that decisions in arbitration are not open to attack for errors of law or fact; nor that by denying, generally, the conclusions that there was a "manifest disregard" of the law by the arbitrator and citing inapposite cases in support; nor of denying that the award was made on the basis of Exhibits A and B to the

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petition but not offering any proof of the real contracts as viewed by petitioner; nor by denying the applicability of the Statute of Frauds to Exhibits A and B and then citing cases which do apply it; nor by referring to the contract numbers without reading the provisions of the contracts themselves to understand their legal effect; nor by denying the claims of the respondent to the existence of superseding oral contracts when they are proven and corroborated by the acts of the parties and documents; nor by supporting its denial by sticking its head in the sand and exclaiming, I do not see the acts and documents and the oral agreement was not made. All of these non-sequitors to respondent's claim that there must be a contract establishing the relation of the parties before the arbitrator may arbitrate are in petitioner's papers. It is obvious that the arbitration agreement becomes relevant only when there are disputes about the performance of the main contract.

The difference between the contract to arbitrate and the contract of the parties out of which the disputes that arose are to be arbitrated is clearly stated by our Supreme Court in *United Steel Workers v. Enterprise Corporation*, 363 U.S. 593, and in the several cases cited in respondent's brief before this court at pp. 20-25. It

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also is to be found in the case cited by petitioner at p. 23 of its brief, Matter of Lipman (Habser Shellac Co.) 289 N.Y. 76, where at p. 79 the court found that a contract existing between the parties defining their relations in which the arbitration, agreement was also found directed arbitration, but said "A different question would be here if the issue was whether the contract never came into existence and hence was void---". At p. 80, the same court said that disputes arising out of a contract are within the exclusive jurisdiction of the arbitrators, generally, "except the making thereof".

Also in the Matter of Meyers (Kinney Motors), 32 A.D. (2) 260, there is a practical application regarding the finding of the true contract of the parties. The court using its equitable powers because the statutory grounds for vacating the award were not broad enough said the award was ineffective as it called for the doing of an illegal act. In a dispute between two unions claiming to be the collective bargaining agents under a single agreement, the issues had been resolved in favor of local 259 by an arbitrator; but later, N.L.R.B. in a separate proceeding which had invoked its jurisdiction properly held that local 355 was the contracting party and sole bargaining agent. The agreement actually named local 355 but local 259 claimed the right by accretion where the employer in the contract was merged with Kinney Motors which had a contract with local 259. The Appellate Division held that it would not go

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behind the decision of N.L.R.B. As the lower court had held that the statute permission vacature of awards Section (7509-7517, C.P.L.R.) did not provide for vacature under the circumstances of this case and it had confirmed the first award to local 259, which had moved to confirm immediately, when it had learned that N.L.R.B. had upheld the claim of local 355, the Appellate Division reversed. In reversing, the Appellate Division said that the lower court had acted in a vacuum, in disregard of the realities of the case. It pointed out that to uphold the award of the first arbitrator would be to require Kinney Motors to disobey N.L.R.B. and that would be unlawful. Hence the invocation of the court's equitable powers.

Even 7503 C.P.L.R. recognizes the difference between the contract of the parties giving rise to the rights and obligations of the parties, and the agreement to arbitrate found in the same contract. In subdivision (a) C.P.L.R. says regarding an application to compel arbitration that where there is no substantial question whether a valid agreement was made--- the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court". There is no case that holds an arbitrator may lawfully

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adjudicate whether there is or is not a contract between the parties other than an agreement to arbitrate. The question is basically a question for the court. In cases where, as in this matter, the parties had several contracts all separate and each had an arbitration agreement, and the writings in proof of the separate contracts are placed before the arbitrator, the arbitrator may not in the guise of interpretation, disregard the plain wording showing the separate contracts and hold that it may award on the basis of "interpretation" that there is only one contract. Or as here, make an award upon a writing which is not even one of the separate contracts evidenced by the writings.

b) THE DIFFERENCE BETWEEN THE
WRITINGS BEFORE THE ARBITRATOR
AND THE CLAIMS TO ULTIMATE FACTS
RESTING UPON ORAL TESTIMONY.

Petitioner in claiming that there is no review of findings of facts and conclusions of law of the arbitrator would have this court shut its eyes to the plain disregard of the writings of the parties that were placed before the arbitrator. Somehow petitioner argues that the evidence in this case is "not reviewable". The respondent's point is that where an arbitrator refuses to find as facts those facts that were conceded or admitted, and he finds facts upon incomplete proof, then such action is repugnant to our sense of justice

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and in the case of where the arbitrator is a knowledgeable lawyer, the award was the result of the use of an excess of power or of bias or partiality.

Here, there were three agreements made in writing and two orally. The oral agreements made were proven by the positive statements of respondent's witnesses, viz; and agreement cancelling the written contracts for 55,000 lbs. and for 10,000 lbs; and the agreement that when late delivery was tendered, the delivery was rejected and another agreement to store the goods for petitioner was made. The initiation of the agreement's were made orally but there was corroboration. In respect to the agreement to cancel there are the telex messages passing between Intsel and its mill with Intsel, ostensibly, carrying out its duty to respond to respondent's inquiries for September delivery date, which inability is established by the telexes in petitioner's possession, the conversations between the parties ended up with a cancellation of the contracts for failure to deliver at Detroit in September as agreed. This conversation took place on September 26, 1969 when it was obvious that the agreed delivery in September could not be performed by Intsel. It was naturally understood that Intsel could not perform and hence that it would default. Also, corroborative of the cancellation

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is petitioner's failure to claim a modification of the agreement to deliver in September. No proof of any extension of delivery was offered at the hearing. Also, the making of the oral agreement to store for Intsel is corroborative of the prior cancellation of the contracts and the refusal to take the late tender of delivery.

The oral agreement to store is also corroborated by the plain sense of the facts that plaintiff lost its own customer for the goods where petitioner owned up to its failure to deliver in September. Petitioner knew and understood the broker situation, and the fact that if Zack had no customer for the goods, it could not otherwise use the goods. Hence, the agreement to store was a reasonable solution to the problem created by petitioner's failure to deliver on time. This agreement also has corroboration in the actions of the parties, in that, instead of paying cash for the goods, Zack picked up the goods, free, carried them to his warehouse, stored the goods and tried to sell them, and when petitioner first asserted a claim to the price many months afterwards, Zack wrote confirming the storing agreement. Also, the fact that the first bill for the price was dated May 31, 1971, more than eighteen months after the storing agreement was made with no bills in between speaks very loudly in favor of the existence

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of the agreement to store.

Further, it is the common experience in our courts that when a party is under a duty to deny an asserted fact and fails to deny it, an admission of the truth is inferred. Such an admission is applicable to both the cancellation or the agreement to store.

The ignoring of the provisions of the purchase and sale agreements themselves and the ignoring of the plain facts of cancellation and of the superseding agreement to store, along with the finding that Exhibits A and B were subsisting contracts is what makes the award a "manifest disregard" of the law warranting vacature.

POINT II

OTHER SHORTCOMINGS OF PETITIONER'S
OPPOSITION TO VACATURE.

a. Exhibits A and B to the petition.

Neither of the above documents were ever received or sent to Zack or were ever discussed with Zack. Mr. Fifield of Intsel said so. How then can they be the basis of the award as stated by the arbitrator?

The opposition now claims that the number 50240 was assigned by it to the June 18, 1969 purchase; and that same

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number was assigned to the January 13, 1969 purchase; and that is attached to the petition as Exhibit A.

From this they reason that the June purchase was the same contract as the December purchase. This is ridiculous, to say the least. The purchases were two separate purchases and two different paper writings evidence different purchase of different types of aluminum. Even the 20,000 lbs. which were a part of the December agreement was effectively changed over from the December order to the June order by Intsel's own confirmations of sale of June 23, 1969 which are Exhibits 1 and 3. The remainder of the 40,000 lbs. of the December-January order were cancelled except for 10,000 lbs. which were delivered and paid for in May. Consequently, in June a new contract came into being and it was then the sole and only contract of the parties. Whether the words were to add to the previous order or not, the legal effect is that a new sale was made which did not come into being until June 18 and that the old contract had ended by the tender of 10,000 lbs. and acceptance and payment thereof in May. It is clear that the June contract was not adjudicated by the arbitrator and that when he said he was doing was that he was awarding upon the January 13 papers. The award itself says that he was acting upon that document and not upon the

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June purchase order. Number or no number, the only thing that counts is the meaning of the contract.

As neither Exhibit A nor Exhibit B were ever delivered to Zack, they cannot be considered the agreement which established the jural relationship between the parties. And this is so by its own terms; both refer to Intsel's own purchase from the mill, upon terms totally different from Intsel's confirmation of sale to Zack of the same goods. Compare Exhibit 3 to Exhibit A and Exhibit 6 to Exhibit B.

c) PETITIONER'S CLAIM TO THE NON-
APPLICABILITY OF THE STATUTE
OF FRAUDS IS NOT SUPPORTED BY
THE CASES CITED.

Actually petitioner is desperately grabbing at straws to make this point. Neither the Commercial Code, Sec. 2-201 (2); nor matter of Helen Whiting, (Trojon Textile Corp.,) 297 N.Y. 360, 362; nor Trafalgar Square, Ltd. v. Reeves Brothers Inc. 35 AD, (2) 196, are authority for this point of the petitioner. Instead the Uniform Commercial Code section depends upon the seller sending its version of the oral agreement to the buyer and the buyer retaining it without comment for the required period of time. Here, Mr. Fifield of Intsel testified that neither Exhibit A nor

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Exhibit B were ever sent to Zack. In both the Helen Whiting and the Trafalgar Square cases there was a finding of a contract based upon sufficient evidence of part performance to take the case out of the Statute of Frauds, to validate the agreement. The courts then went on to the arbitration agreement holding it to be applicable. The question of the Statute of Frauds in both cases was not applicable as it is in the case at bar.

d. THE PETITIONER'S CLAIM TO RESPONDENT'S
FAILURE TO PROVE ENTITLEMENT TO VACATURE
OF THE AWARD IS NOT PROVEN.

Petitioner has assiduously collected cases containing words of a general character alluding to the fact that awards should not be lightly set aside. That maybe so, but our Supreme Court said that in the instance where the arbitrator has exceeded his powers by making a new contract for the parties or has manifestly disregarded his source of power, the award, should be vacated. Also, respondent has cited cases where an award may violate the public policy of our state as in the case of the disregard of the Statute of Frauds or as in Matter of Meyers (Kinney Motors) supra, the award would require the violation of a lawful decision of N.L.R.B., the award should be vacated. Also, in M.W. Gervain Inc, v. Robilotto, 40 A.D. (2) 1060, the Appellate

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Division divided in favor of the award on a finding of a fact. The dissenting opinion, however, lists several cases where the Court of Appeals of this State has held that awards had to be set aside if unlawful even though that reason is not one of the reasons found in the Statute.

- e. THE PETITIONER'S CLAIM OF NO CORRUPTION OF NO PARTIALITY IS NOT BASED UPON PROOF THAT THE FACTS ALLEGED BY RESPONDENT ARE NOT TRUE OR DO NOT EXIST.

Again petitioner relies upon excerpts of law and fails to meet the issue tendered by respondent under these headings. Petitioner admits that the arbitrator was his choice, it does not deny that respondent was denied the privilege of selecting arbitrators and of not being excused from the default of Detroit counsel in this important aspect of the case. Petitioner admits that Zack's counsel brought up the question at the hearing before it had started. Also petitioner's analysis of the arbitrator's action while it pooh-poohs the several separate events, which, if taken singly could not amount to evidence of partiality, yet, when taken in their totality plus the pressure brought to bear upon the witness Krasnov, did create an air of uncleanness, attributed to bad motives emanating from behind the scenes. It is respectfully submitted that petitioner fails to cleanse that malodorous spirit out of the atmosphere.

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- f. THE PETITIONER'S CLAIM THAT
NO PROOF WAS MADE OF A
FAILURE TO ALLOW RESPONDENT'S
EVIDENCE INTO THE RECORD.

Under subparagraph C of Point III at p. 15 of its brief the petitioner makes this claim, but, it fails to prove that Krasnov was not prevented from stating the evidence showing that Zack was a broker, a middle man, and that he placed his cancellation of the June and July written contracts upon the necessities of the case arising from the fact of Zack being a middle man and not a consumer of the goods that were the subject of the contracts and the fact of Intsel's manifest breach of the writings in failing to deliver as agreed. Also, all of these incidents, together with the allowance of a great deal of irrelevant and incompetent evidence by Intsel tended to show a pervading motive of favoring Intsel. Respondent does not disagree that the general language of the cases cited can be found in them, but, they are inappropriate to Intsel's burden for Intsel fails to deny the fact claims of the respondent.

The same thing is true with the argument p. 17 of the petitioner's brief. There are no facts stated disproving respondent's facts and there are no cases reciting law con-

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trary to the law established by the case cited by respondent under the heading that the arbitrator exceeded his powers:

- g. PETITIONER'S CLAIMS TO A PROPER CALCULATION OF THE DAMAGES ARE NOW BASED UPON THE CONTRACTS THAT WERE IGNORED BY THE ARBITRATOR AND THIS IS ADMISSION THAT THE ARBITRATOR WAS IN ERROR WHEN HE AWARDED ON THE BASIS OF THE EXHIBITS A AND B.

This is a complete reversal of the facts by Intsel in the vain hope of supporting the award in the manner that was rejected by the arbitrator. At pages 20 and 21, petitioner admits that the only contracts that were in force were the June and July orders. It does not specifically say so, but, it treats with them as such. It ignores the fact that the award and the petition allege and plead that the arbitrator acted only in accordance with the writings dated January 13, 1969 and August 7, 1969. The arbitrator did not mention any of the writings presently mentioned at pp. 20, 21 and pp. 22 and 23 of petitioner's brief. Nor does the arbitrator refer to the writings he acted upon by number. The numbers were assigned by Intsel for its own use. There was no meeting of the minds upon the numbers having any special meaning. They were merely Intsel's file numbers. It is the wording that counts and it is worth repeating that the

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wording of the January 13, 1969 and August 7, 1969 writings, copies of which are attached to the petition, merely confirm Intsel's own purchase from its mill. The June and July purchases on the other hand, are separate writings which do evidence the jural relation of the parties contracted for. These were disregarded by the arbitrator.

How then can the June and July contracts now be used to support the award? The rights of the respondent are too important to be shifted about at will and ignored subject to being pulled back into the light if and when it suits the petitioner.

Note also the reference to the overages. They too, refer to the June and July purchase orders. Petitioner now claims that it submitted oral evidence of an agreement by Zack to take these overages. No one, but no one ever testified to that fact at the hearing. As stated heretofore only Mr. Fifield testified but he did not testify from knowledge as he had none. He did not testify about the overages. He could not. Petitioner does not even identify who talked with Mr. Zack when the latter supposedly agreed to accept and pay for the overage. This claim is made of whole cloth.

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- h. THE CLAIM OF THE PETITIONER
TO THE EXISTENCE OF A FACTUAL
ISSUE RESPECTING THE CANCELLATION
OF THE ORAL AGREEMENT TO STORE
IS A BASE MAKE-WEIGHT FOR THE
PURPOSE OF ARGUMENTATION.

If an issue had been raised before the arbitrator about the cancellation or about the oral agreement, petitioner fails to show how it was done. It merely makes that claim for the first time in its papers on this motion. Necessity for the claim does not justify the failure to produce the proof.

Nor does petitioner deny the facts alleged by respondent as to what the proof was at the hearing. It does not deny that Mr. Fifield was its only witness; that neither Mr. Besso nor Mr. Romano were present; that no writings were produced by it to show the contrary to the proof of the respondent respecting the cancellation and the storing agreement. In fact, the actions of the parties corroborate both events. The late tender of delivery, the delivery free of payment, the telexes corroborating respondent's demands for delivery in September by contract, all these corroborate respondent's claims. Nothing is offered by petitioner in refutation of respondent's claims or in support of its own claims to an issue having been raised.

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WHEREFORE it is submitted that justice demands that the award should be vacated. In that event either the petition should be dismissed, and the damages ascertained on the counter-claim, or the court should direct a trial on the facts of the case, with an opportunity afforded to decide whether a jury should be demanded or waived.

SWORN TO BEFORE ME THIS
22nd DAY OF MARCH, 1974.

Anthony B. Cataldo



INTERNATIONAL SELLING CORPORATION
EAST 42ND STREET • NEW YORK, N. Y. 10017

W. Zack Metal Co.
60 West 57th Street
New York, New York

TELEPHONE: OXFORD 7-1331
CABLE ADDRESS: INTSEL NEW YORK
INTERNATIONAL TELEX: NY 4348 INTLBELL, N. Y.

DATE OF ORDER August 7, 1969
CUSTOMER ORDER 3917
OUR CONTRACT 50617 - Zack
MILL ORDER

MILL CONFIRMATION

DATE:

GENTLEMEN:

PLEASE BE ADVISED THAT WE HAVE RECEIVED FORMAL MILL ACKNOWLEDGEMENT OF SUBJECT ORDER AND WE CONFIRM HAVING SOLD TO YOU AND YOU HAVING PURCHASED FROM US THE FOLLOWING MATERIAL SUBJECT TO THE TERMS PRINTED ON THE BACK.

YOUR COOPERATION ON VERIFYING ALL DETAILS WILL BE APPRECIATED.

DESCRIPTION OF MATERIAL

QUANTITY

SALES PRICE

2017-T4 Aluminum Round Rod, Extruded

Lbs.

Per Lb.

2-1/2" dia. round x 12 ft. length

10,000

.46

In accordance with ASTM B211 but not cold finished

No stencilling

Submit MTC & A

Final destination for insurance: Detroit

To be applied against conversion

Final user and end use unknown

Customer will submit directly to Silvey Shipping

necessary documentation for conversion entry

Ship, if possible, together with order 30240/003-60363

\$39 Ex Mill

MEMBER OF THE PUGHEN GROUP

ZACK'S EXHIBIT 6

-100-

INTSEL CORPORATION

825 THIRD AVENUE • NEW YORK, N.Y. 10022

TEL (212) 758 5880 • Cable Address: Intsel New York

W.U. 125 718 • TWX 212 420 4117



DUNS 00 168-7805

INVOICE NO. 10329

TERMS: Net Cash Against Documents

DATE PAYMENT DUE 11/19/69

INSTR. NO. ST.	TAX	CONF. NO.	INVOICE NO.	DATE	CUST. REF. NO.
425222	0322	50617	10329	111369	3917

L. W. ZACK METAL CO.
90 AMSTERDAM AVE.
DETROIT, MICHIGAN 48202

VESSEL SS "LUDOLF
OLDENDORF"
ARRIVAL 11/13/69
DETROIT

V SHIPPED:

DATE SHIPPED:

FROM:

TO:

SPECIAL INSTRUCTIONS:

DESCRIPTION	PRODUCT	QUANTITY (IN POUNDS)	PRICE (IN DOLLARS)	AMOUNT (IN DOLLARS)
-------------	---------	-------------------------	-----------------------	------------------------

017-T4 ALUMINUM ROUND ROD, EXTRUDED

IX (6) CASES CONTAINING:

ASE
OS. S I Z E WEIGHT

-6 2½" DIA. ROUND
 X 12' LENGTH 10,335#

X DOCK DETROIT, DUTY PAID

610612

10,335

\$.464

✓ \$4795.44

TOTAL

✓ \$4795.44T

TOTAL GROSS: 11,497#

MARKED: ZM 3917
GROSS & NET WEIGHTS
MADE IN FRANCE
DETROIT NO. 1/6

DOCUMENTS ATTACHED: PACKING LIST

ZACK'S EXHIBIT 7

-101-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - X

In the Matter of the Arbitration
Between

INTSEL CORPORATION,

Petitioner,

and

M.W. ZACK METAL COMPANY,

Respondent.

- - - - - X

APPEARANCES

WEIL, GOTSHAL & MANGES
New York, N.Y.

Attorneys for Petitioner

JOHN M. SCHWARTZ

JOSEPH WEISS

Of Counsel

ANTHONY B. CATALDO

New York, N.Y.

Attorney for Respondent

GURFEIN, D.J.:

The petition for confirmation of an arbitration
award has been unnecessarily transformed from the ordinarily
perfunctory to the complicated by respondent's motion to

dismiss the petition for failure to state a claim and because of charges of alleged misconduct on the part of the arbitrator.

The petitioner Intsel Corporation ("Intsel") is a New York corporation with its principal place of business in New York. Intsel is a commission broker and is part of a group of companies located in France called Pechiney. Intsel sells to United States customers metal objects which are fabricated to specification at a mill in France. In this case the customer was the respondent M.W. Zack Metal Co. ("Zack") and the mill was Cedegur.

Zack is a Michigan corporation with its principal place of business in Michigan. It is a dealer in non-ferrous scrap and new metals which purchases metal objects on behalf of customers with specified needs. In the instant case Zack made its purchases from Intsel on behalf of Fox Manufacturing Co. ("Fox"), a Detroit firm.

Intsel alleges that Zack has breached two contracts for the purchase of various metal tubings in interstate commerce. The contracts are numbered 50240

and 50617. Each contract consists of several written documents; but the arbitration clause in contract 50240 is contained in a document dated January 13, 1969 (Ex. A to Petition) and the arbitration clause in contract 50617 is contained in a document dated August 7, 1969 (Ex. B to Petition). The clause in each instance is identical, and reads as follows:

"Any controversy arising under or in relation to this contract or any modification thereof shall be settled by arbitration in the City of New York in accordance with the Arbitration Laws of the State of New York and the Rules then obtaining of the American Arbitration Association, and judgment on the award may be entered in any court, State or Federal, having jurisdiction."

The arbitrator agreed with Intsel's claim that Zack had breached the contracts and awarded the petitioner \$35,253.60 together with interest at 6% from January 1, 1970 to date of payment plus fees in the amount of \$702.53. Intsel has demanded payment of the award, and Zack has refused. Intsel now seeks confirmation of the arbitrator's award plus interest from date of judgment, together with the costs of this proceeding. Respondent has cross-moved for dismissal of the petition and for vacation of the award.

Since the respondent's jurisdictional claims are frivolous and the charges of misconduct unfounded, the arbitrator's award is confirmed and costs allowed.

1) Jurisdictional Claims

Zack claims there is no subject matter jurisdiction and no personal jurisdiction. It asserts that there is improper venue and that there is a failure to state a claim.

The Court has subject matter jurisdiction since there is diversity jurisdiction, 28 U.S.C. § 1332, and since the contract in issue evidences a transaction involving commerce, 9 U.S.C. § 2. Ballantine Books Inc. v. Capital Distributing Co., 302 F.2d 17, 19 (2 Cir. 1962); Reed & Martin, Inc. v. Westinghouse Electric Corp., 439 F.2d 1269, 1275-76 (2 Cir. 1971).

9 U.S.C. § 9 sanctions the service here made upon Zack in Detroit by the United States Marshal, even if respondent were not deemed to have waived that objection. Venue is also proper here. The submission to

arbitration in New York in itself waives any objection to venue. Farr & Co. v. CIA Intercontinental, 243 F.2d 342 (2 Cir. 1957). Reed & Martin, supra. Finally, the relief which the petitioner seeks is confirmation of an arbitration award. 9 U.S.C. § 9.

2) Claims of Arbitrator's Misconduct

Zack alternatively moves to vacate the award because:

"a). the same was procured by corruption, fraud or undue means;

b). the arbitrator was guilty of misconduct in refusing to hear evidence pertinent and material to the controversy, in relying upon incompetent and unlawful evidence, and was guilty of other misbehavior by which the rights of the respondent were prejudiced; and

c). where the arbitrator exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

The District Court's function in confirming or vacating an award is "severely limited." Amicizia Societa Navigazione v. Chilean Nitrate and Iodine Sales Corp., 274 F.2d 805, 808 (2 Cir. 1960). "If it were

otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated."

(Id.) The scope of inquiry extends only "to ascertaining whether there exists one of the specific grounds for the vacation of an award, provided in § 10 of the Arbitration Act." Saxis Steamship Co. v. Multifact International Traders, Inc., 375 F.2d 577, 581 (2 Cir. 1967). And the burden of proof, in respect to claims arising under the provisions of § 10, rests with Zack. (375 F.2d at 582)

(a) Zack alleges that the award was procured by "corruption, fraud or undue means." 9 U.S.C. § 10(a). Although this point is not separately briefed, apparently it refers to Eugene M. Zack's affidavit wherein it is charged that the respondent was not given an opportunity to name an arbitrator (at p. 2). According to the unrefuted statements of John M. Schwartz's affidavit (attorney for petitioner), Zack's claim is patently untrue. Zack was properly notified of Intsel's intention to commence arbitration proceedings by service of a Demand for Arbitration which had been filed with the New York Office of the American Arbitration Association ("AAA"). Mr. Schwartz avers that on May 9 the AAA forwarded to both sides a list

of names selected from its panel of arbitrators. "Both parties were asked to cross out the names of any proposed arbitrators that were unacceptable, to mark the remaining names in order of preference." Mr. Schwartz designated Mark A. Buckstein his fifth choice, out of six possible names. On May 30, 1973 the AAA sent Zack's attorney a letter indicating that if Zack did not return the list of arbitrators by June 6, 1973 all names would be deemed acceptable. Evidently no objection was ever made and on June 18 the AAA advised both parties that Mr. Buckstein had been appointed as arbitrator. Copies of these letters from the AAA are attached as exhibits to Mr. Schwartz's reply affidavit.

This procedure was proper.

(b) Zack charges misconduct on the part of the arbitrator in refusing to hear pertinent evidence, relying on unlawful evidence and for other misbehavior. 9 U.S.C. § 10(c).

The specific evidence allegedly refused is the testimony of a Mr. Krasnov, Zack's New York representative "that Zack was a broker, a middle man, and

that he placed his cancellation of the June and July written contracts upon the necessities of the case [because Zack's customer, Fox, needed the material by September in order to fulfill a Government contract, and] Intsel's manifest breach of the writing in failing to deliver as agreed." (Cataldo Affd. at 10). Mr. Zack's own affidavit contradicts the assertion that the arbitrator refused Krasnov's testimony on this point. "Also, Mr. Krasnov testified before the arbitrator that he had cancelled the contract with Intsel for the latter's failure to deliver on the agreed date."

The fact that the arbitrator did not credit this testimony is not reviewable since the arbitrator's award is conclusive as to issues of fact. See Oinoussian Steamship Corp. of Panama v. Sabre Shipping Corp., 224 F. Supp. 807 (S.D.N.Y. 1963). And the issue of whether the contract had been terminated is for the arbitrator to decide. Eastern Marine Corporation v. Fukaya Trading Co., 364 F.2d 80, 85 (5 Cir. 1966); Matter of Terminal Auxiliar Maritima, S.A., 6 N.Y.2d 294, 298 (1959).

Zack claims that Exhibit B was not offered in evidence and yet was relied on by the arbitrator in making

his award. That is not true. Exhibit B was introduced as Exhibit 6C.

Zack's claim that neither Exhibit A nor B to the petition were admissible at the hearing because they were not signed by the respondent is equally untenable. Fisser v. International Bank, 282 F.2d 231 (2 Cir. 1960); Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc., 334 F. Supp. 1013, 1019-20 (S.D.N.Y. 1971). The arbitrator may well have decided that the contract was between merchants and therefore did not require their signatures, U.C.C. § 2-201(2); or that even if the contracts did not meet the formal requirements of the statute, it was enforceable under the provisions of U.C.C. § 2-201(3)(b) because the respondent admitted the contract was made but contested only that it was not enforceable beyond the quantity of goods admitted; or, that it was enforceable under U.C.C. § 2-201(3)(c) because the goods had been accepted by the respondent. Under any of these interpretations, this Court would be bound by the arbitrator's conclusions even if it were erroneous. Oinoussian, supra; Burchell v. Marsh, 58 U.S. 344 (1854). Nor is there any need for the arbitrator to have explained his reasons for his decision. Burhardt v. Polygraph Co. of America,

350 U.S. 198, 203 (1956); Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2 Cir. 1972). In any event, the respondent concedes in his brief (p. 12) that "Petitioner issued a sales confirmation in writing accepting the order. The arbitration agreement appears as a printed clause on the back of the sales confirmation of sale."

(c) There is no basis for the charge that the arbitrator exceeded his power, no "manifest disregard" for the law having been demonstrated. See Amicizia Societa, supra, 274 F.2d at 808.

In his memorandum of law, the respondent levels a series of charges of bias, some of which have been dealt with already. Others concern admitting "obviously hearsay evidence, obviously perjurious statements [by petitioner's witness], and . . . badger[ing] the [respondent's] witness [Mr.] Krasnov [, Zack's N.Y. representative,] to the point where Krasnov got up and left during his testimony."

Mr. Schwartz, petitioner's attorney, who was present during these proceedings has sworn by affidavit that there was no indication of partiality by the arbitrator toward either side.

Respondent argues that there was a manifest exaggeration of damages and that this evidences partiality or bias on the part of the arbitrator. While it is true that the total selling price on the purchase contracts of January 13, 1969 and August 7, 1969 for a value of 50,000 pounds is only \$24,760, the entire contracts as amended show sales of 70,000 pounds. (And see Respondent's Brief p. 13). The total arrived at by the arbitrator thus conforms with the amended contract. The reference in his award to January 13, 1969 and August 7, 1969 is merely a reference to the "Arbitration Agreements entered into by the above-named parties."

The admission of hearsay at the hearing is of no import, since technical rules of evidence need not be followed at an arbitration hearing. Burchell v. Marsh, supra, 58 U.S. at 352. While perjury may constitute fraud, the respondent points to no specific testimony which is palpably perjurious. Finally Mr. Zack's own affidavit demonstrates that the arbitrator's alleged bias was hardly the cause of Mr. Krasnov's departure from the witness stand. Krasnov, seeing things were going against him,

ran to avoid further questioning.

The award is confirmed. Costs to petitioner.

It is so ordered.

May 9, 1974

MURRAY I. GUTMAN

U.S.D.J.



INTERNATIONAL SELLING CORPORATION
220 EAST 42ND STREET * NEW YORK, N. Y. 10017

TO:

M.W. Zach Metal Co.
690 Amsterdam Ave.
Detroit, Michigan

Change Order III

TELEPHONE: OXFORD 7-1331
CABLE ADDRESS: INTSEL NEW YORK
INTERNATIONAL TELEX: NY 4348 INTLSELL N.Y.

DATE OF ORDER **January 13, 1960**

CUSTOMER ORDER

OUR CONTRACT **50340-M.W. Zach**

MILL ORDER

Date this change **3/14/60**

MILL CONFIRMATION

DATE:

GENTLEMEN:

PLEASE BE ADVISED THAT WE HAVE RECEIVED FORMAL MILL ACKNOWLEDGEMENT OF SUBJECT ORDER AND WE CONFIRM HAVING SOLD TO YOU AND YOU HAVING PURCHASED FROM US THE FOLLOWING MATERIAL SUBJECT TO THE TERMS PRINTED ON THE BACK.

YOUR COOPERATION ON VERIFYING ALL DETAILS WILL BE APPRECIATED.

ITEM	DESCRIPTION OF MATERIAL	QUANTITY	SALES PRICE
9.	<p>As per our today's cable, please release against this order</p> <p>1-3/4" O.D. x .281" Wall</p> <p>Release to remain on production hold</p> <p>All other terms and conditions remain unchanged</p>	<p>100.</p> <p>10,000</p>	
PACKING:		MEMBER OF THE PEOHNEY GROUP	
MARKS:		SHIPMENT	
		TERMS	
		DELIVERY	

VERY TRULY YOURS.

INTERNATIONAL SELLING CORPORATION

50240

9/24/69 GJ-004

CEGEDUR 28907

ZACK METALS

50240 - 005/80563

CLIENT EXTREMELY ANGRY ABOUT DELIVERY DELAY AND REQUESTS PARTIAL SHIPMENT THIS WEEK. PLEASE ADVISE.

INVESTIGATION
CASE NO. 1370-0515-73

NOV 8

NO. 3-A
CLAIMANTS REPORT

INTERNATIONAL SELLING CORPORATION
EAST 42ND STREET • NEW YORK, N. Y. 10017

TO:

Zack Metal Co.
Amsterdam Avenue
Detroit, Michigan

PURCHASED FROM:

Ufalex as agents for
Cegedur

TELEPHONE: OXFORD 7-1331
CABLE ADDRESS: INTSEL NEW YORK
INTERNATIONAL TELEX: NY 4348 INTLSSELL. N.

DATE OF ORDER January 13, 1969
CUSTOMER ORDER 3908
OUR CONTRACT 50240 - M.W. Zack
MILL ORDER 80035, 80152
Date this change 6/23/69

Change Order IV

Change Order IV

SALES AND PURCHASE CONTRACT

DESCRIPTION OF MATERIAL

QUANTITY

PURCHASE PRICE

SALES PRICE

We have placed this order originally for 40,000 lbs. against which we have shipped 10,000 lbs. The balance against this order therefore is 30,000 lbs. The customer wants to increase this order now by 5,000 lbs. and would like to add also the 20,000 lbs. ordered on our 50314/80152 to this order. We have cancelled our 50314/80152 as per today's change order, and the balance of order 50240/80035 should read:

1-5/8" O.D. x .281 Wall x 14'8-19' length
1-3/4" O.D. x .312
1-3/4" O.D. x .281
2-1/8" O.D. x .312
1-3/4" O.D. x .281
1-3/4" O.D. x .312
2-1/8" O.D. x .250

Lbs.

cancelled
15,000
shipped
cancelled
15,000
15,000
10,000

Shipment of item 2 requested A.S.A.P.
Shipment of balance requested for September arrival in Detroit

AMERICAN ARBITRATION ASSOCIATION

CASE No. 1310 - 0395 - 73

NOV 8 1969

No.

2-6

CLAIMANTS

EXHIBIT

MEMBER OF THE PECHINEY GROUP

PURCHASE

SALES

SHIPMENT

SHIPMENT

TERMS

TERMS

DELIVERY

DELIVERY

-117-

STATEMENT

INTSEL CORPORATION

825 THIRD AVENUE • NEW YORK, N.Y. 10022

TEL: (212) 758-5880 • Cable Address: Intsel New York

INTERNATIONAL TELEX: RCA 22434R LSC NEW YORK

ITT 421573 INTSEL NEW YORK • FRENCH CABLE: 02626 INTSEL NEW YORK



18425

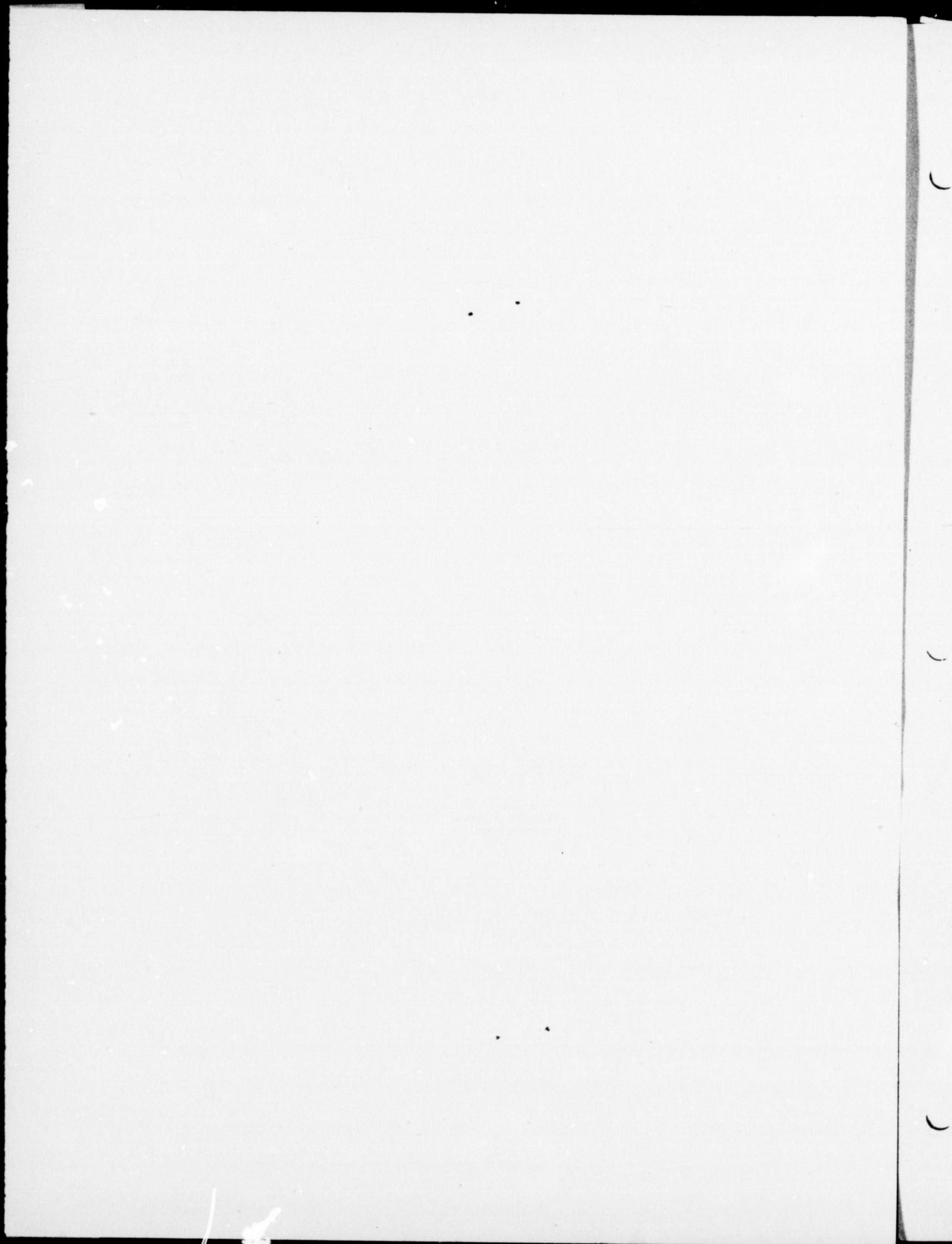
M.W. Zack Metal Co.
27460 Gloede Drive
Detroit, Michigan 48093

MAR 31 1971

ACT NO.	ACCT. NO.	INVOICE NO. CHECK NO.	DESCRIPTION	DEBITS	CREDITS	BALANCE
BALANCE FORWARD						35,253.60
<div style="position: relative; height: 150px;"> <div style="position: absolute; top: 10px; right: 10px; text-align: right;"> AMERICAN ARBITRATION ASSOCIATION CASE NO. 1318-0395-73 NOV 8 1971 No. <u>D-1</u> <u>Rep</u> EXHIBIT </div> </div>						

-118-

 PAY LAST
AMOUNT IN
THIS COLUMN

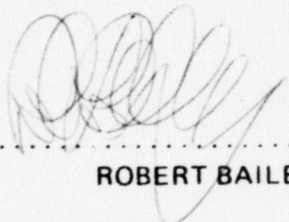
STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 6 day of Oct. Mon. 1974 deponent served the within *appendix* upon *Weil, Hotschal + Manges*

attorney(s) for *Appellee*

in this action, at *767 - Fifth Ave.*
N.Y.C.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this

6 day of *Nov.* 1974


WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976